No.

In the Supreme Court of the United States

ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL., PETITIONERS

v.

ROSALINA CUELLAR DE OSORIO, ET AL.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Immigration and Nationality Act (INA) permits United States citizens and lawful permanent resident aliens to petition for certain family members to obtain visas to immigrate to the United States or to adjust their status in the United States to that of a lawful permanent resident alien. The family member sponsored by the petitioner is known as the primary beneficiary. The primary beneficiary's "spouse or child" may be a derivative beneficiary of the petition, "entitled to the same status[] and the same order of consideration" as the primary beneficiary. 8 U.S.C. 1153(d). Section 203(h)(3) of the INA, 8 U.S.C. 1153(h)(3), grants relief to certain persons who reach age 21 ("age out"), and therefore lose "child" status, after the filing of visa petitions as to which they are beneficiaries.

The questions presented are:

1. Whether Section 1153(h)(3) unambiguously grants relief to all aliens who qualify as "child" derivative beneficiaries at the time a visa petition is filed but age out of qualification by the time the visa becomes available to the primary beneficiary.

2. Whether the Board of Immigration Appeals reasonably interpreted Section 1153(h)(3).

PARTIES TO THE PROCEEDING

Petitioners, who were defendants in the district court and appellees in the court of appeals, are Alejandro Mayorkas, Director, United States Citzenship Immigration Services; Janet Napolitano, Secretary of Homeland Security; Lynne Skeirik, Director, National Visa Center; Christina Poulos, Acting Director, California Service Center, United States Citizenship and Immigration Services; and Hillary Rodham Clinton, Secretary of State.

Respondents, who were plaintiffs in the district court and appellants in the court of appeals, are Rosalina Cuellar de Osorio, Elizabeth Magpantay, Evelyn Y. Santos, Maria Eloisa Liwag, Norma Uy, Ruth Uy, and Teresita G. Costelo and Lorenzo P. Ong, individually and on behalf of a class of others similarly situated.

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The Solicitor General, on behalf of Attorney General Eric H. Holder, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-35a) is reported at 695 F.3d 1003. The vacated opinion of the court of appeals panel (App., *infra*, 36a-60a) is reported at 656 F.3d 954. One opinion of the district court (App., *infra*, 61a-78a) is reported at 663 F. Supp. 2d 913; the other (App., *infra*, 79a-84a) is not published in the Federal Supplement but is available at 2009 WL 4030516.

JURISDICTION

The judgment of the en banc court of appeals was entered on September 26, 2012. On December 18, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 25, 2013. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 87a-109a.

STATEMENT

This case involves the proper interpretation of 8 U.S.C. 1153(h)(3), which addresses how to treat an alien who reaches age 21 ("ages out"), and therefore loses "child" status under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, after the filing of a visa petition as to which he is a beneficiary. The meaning of that provision is a question that split the en banc Ninth Circuit by a vote of 6 to 5, has divided the courts of appeals, and has serious implications for administration of the visa system.

1. a. Under the INA, United States citizens and lawful permanent resident aliens may petition for certain family members to obtain visas to immigrate to the United States or to adjust their status in the United States to that of a lawful permanent resident alien. The INA limits the total number of family-sponsored immigrant visas issued each year, see 8 U.S.C. 1151(c); establishes various "preference" categories that classify and prioritize different types of family members, see 8 U.S.C. 1153(a); caps the number of visas that may be issued in those categories each year, see *ibid.*; and places annual limitations on

the number of natives of any single foreign state who can obtain visas in each category, see 8 U.S.C. 1152(a)(2).

The INA establishes the following "preference" categories for family-sponsored ("F") visas:

> F1: unmarried sons or daughters (age 21 or older) of U.S. citizens
>
> F2A: spouses or children (unmarried, under age 21) of lawful permanent resident aliens
>
> F2B: unmarried sons or daughters (age 21 or older) of lawful permanent resident aliens
>
> F3: married sons or daughters of U.S. citizens
>
> F4: brothers or sisters of U.S. citizens

See 8 U.S.C. 1153(a)(1)-(4); see also 8 U.S.C. 1101(b)(1) (definition of "child").[1]

A citizen or lawful permanent resident seeking an immigrant visa for a family member in one of those categories must file a petition with the United States Citizenship and Immigration Services (USCIS) in the Department of Homeland Security.[2] See 8 U.S.C.

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[1] Petitions by U.S. citizens on behalf of an "immediate relative"—that is, a spouse, child (under age 21), or parent, see 8 U.S.C. 1151(b)(2)(A)(i)—are not considered "preference" petitions, and are subject to fewer restrictions. The INA also permits the issuance of visas to aliens in employment-based categories, see 8 U.S.C. 1151(d), 1153(b), and aliens from countries with historically low immigration rates to the United States, see 8 U.S.C. 1153(c); see also 8 U.S.C. 1159 (providing for adjustment of status of asylees and refugees).

[2] Various functions formerly performed by the Immigration and Naturalization Service, or otherwise vested in the Attorney General, have been transferred to officials of the Department of Homeland Security. Some residual statutory references to the

1154(a)(1); 8 C.F.R. 204.1(a)(1); USCIS, Form I-130, Petition for Alien Relative, http://www.uscis.gov/files/form/i-130.pdf. The family member sponsored by the petitioner is known as the primary (or principal) beneficiary.

When a preference petition is filed, USCIS assesses it and—if it meets applicable requirements—approves it. 8 U.S.C. 1154(b). That approval does not result in immediate issuance of a visa to the primary beneficiary, however. The beneficiary receives a place in line to wait for a visa to become available. Within family-preference categories, the order of the line is determined by the petition's priority date—that is, the date when it was filed with the agency. See 8 U.S.C. 1153(e); 8 C.F.R. 204.1(b); 22 C.F.R. 42.53(a).

Every month, the State Department publishes a visa bulletin with various cut-off dates for each family-preference category. See 8 C.F.R. 245.1(g)(1); 22 C.F.R. 42.51. When the applicable cut-off date is later than the petition's priority date, the priority date is "current," and a visa is available. In order to obtain the visa and become a lawful permanent resident alien, the primary beneficiary must submit an application, pay fees, demonstrate continued eligibility, and complete consular processing (if abroad) or obtain adjustment of status (if present in the United States). See 8 U.S.C. 1153(g), 1201(a), 1255.

Given the annual limitations on the total number of visas that may be granted for a particular family-preference category (as well as separate limitations on the number of natives of a single country who may

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Attorney General that pertain to the transferred functions are now deemed to refer to the Secretary of Homeland Security. See 6 U.S.C. 251, 271(b), 557; 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

receive visas in any given year), the waiting line for visa availability is often quite long. For instance, Filipino F4 primary beneficiaries (brothers and sisters of U.S. citizens) whose priority dates are now current have been waiting for more than 20 years. See U.S. Dept. of State, Visa Bulletin, http://travel.state.gov/visa/bulletin/bulletin1360.html (last visited Jan. 24, 2013).

A primary beneficiary of a preference petition who advances to the head of the line can also aid certain "derivative" beneficiaries—the primary beneficiary's spouse and unmarried children under age 21. Derivative beneficiaries are "entitled to the same status[] and the same order of consideration provided" to the primary beneficiary with respect to a pending petition. 8 U.S.C. 1153(d) (describing derivative beneficiaries as "accompanying or following to join[] the spouse or parent"). Accordingly, if a visa is available to a primary beneficiary, it is available to a derivative beneficiary as well. See *ibid.* But by the time the primary beneficiary's priority date becomes current, a child who qualified as a derivative beneficiary when the petition was originally filed may have "aged out"—that is, passed his or her twenty-first birthday. See 8 U.S.C. 1101(b)(1). If that happens, the aged-out person can no longer claim derivative-beneficiary status. See 8 U.S.C. 1154(e).

b. In 2002, Congress enacted the Child Status Protection Act (Act), Pub. L. No. 107-208, 116 Stat. 927. In a provision now codified at 8 U.S.C. 1153(h), the Act modified the visa system to grant relief to certain aged-out persons.

Section 1153(h)(1) addresses the passage of time between the filing of a visa petition and agency ap-

proval of the petition. It provides that "a determination of whether an alien satisfies the age requirement * * * shall be made using * * * the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for the alien's parent), * * * reduced by * * * the number of days in the period during which the applicable petition described in paragraph (2) was pending." 8 U.S.C. 1153(h)(1); see *ibid.* (conditioning this reduction on the alien having "sought to acquire the status of an alien lawfully admitted for permanent residence within one year of [visa] availability"); see also *Martinez* v. *Department of Homeland Sec.*, 502 F. Supp. 2d 631, 636 (E.D. Mich. 2007) (explaining that prior to enactment of Section 1153(h)(1) the relevant date for purposes of determining an alien's qualification for "child" status was the date of adjudication of an "application for permanent residency" filed after a visa became available).

Section 1153(h)(2), to which Section 1153(h)(1) refers, describes a set of relevant petitions. It states that "[t]he petition described in this paragraph is" an F2A petition naming a child as a primary beneficiary or any petition including a child as a derivative beneficiary and the child's parent as a primary beneficiary. 8 U.S.C. 1153(h)(1); see 8 U.S.C. 1153(a)(2)(A) (providing for F2A petitions); 8 U.S.C. 1153(d) (providing that a child may be a derivative beneficiary of various petitions).

Together, these provisions permit certain aged-out beneficiaries to retain "child" status. For example, if USCIS took three years to approve a visa petition

filed when an alien was age 18 and a visa became available one year after approval, an alien who met the requirements of Section 1153(h)(1) would be treated for purposes of the statute as if he were 19 years old rather than 22 years old.

Section 1153(h)(3), which is the subject of this case, addresses the passage of a distinct period of time—the time between the approval of a petition and the availability of a visa. It provides that "[i]f the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. 1153(h)(3).

c. The Board of Immigration Appeals (Board or BIA) interpreted Section 1153(h)(3) in *Matter of Wang*, 25 I. & N. Dec. 28 (B.I.A. 2009), a decision that helps illustrate how the visa preference system operates in practice. Wang was the primary beneficiary of an F4 visa petition filed by his sister, a U.S. citizen. See *id.* at 29; 8 U.S.C. 1153(a)(4). When the F4 petition was filed, Wang's daughter was a minor and a derivative beneficiary of the petition under 8 U.S.C. 1153(d). The petition was approved after a short while, and Wang and his daughter waited for a visa to become available. Approximately a decade later, Wang received a visa and was admitted to the United States as a lawful permanent resident. See 25 I. & N. Dec. at 29. By that time, however, his daughter was over 21 (even subtracting the small amount of time between the filing of the F4 petition and its approval), and she no longer qualified for derivative-beneficiary

status. See *id.* at 32; see also 8 U.S.C. 1101(b)(1) (definition of "child"), 1153(d) (identifying derivative beneficiaries to include the "child" of the primary beneficiary).

Wang then filed a new petition with USCIS on behalf of his daughter—an F2B petition, in the category that covers filings by lawful permanent residents on behalf of their unmarried sons and daughters who are over age 21. See 8 U.S.C. 1153(a)(2)(B). Immigration authorities approved the F2B petition filed on behalf of Wang's daughter, but gave it a priority date corresponding to the date on which it was filed, not the date on which the earlier F4 petition had been filed by Wang's sister on behalf of Wang himself. See 25 I. & N. Dec. at 29.

The Board rejected the argument that Section 1153(h)(3) dictated a different result. The Board explained that "the language of section [1153(h)(3)] does not expressly state which petitions qualify for automatic conversion and retention of priority dates." 25 I. & N. Dec. at 33. The Board also explained that "[i]n immigration regulations, the phrase 'automatic conversion' has a recognized meaning," which includes a requirement that the petitioner be the same before and after conversion. *Id.* at 34 (citing, *inter alia*, 8 C.F.R. 204.2(i)); see *id.* at 35 ("Similarly, the concept of 'retention' of priority dates has always been limited to visa petitions filed by the same family member."). The Board concluded that Congress had acted consistent with the accepted understanding of that term, discerning nothing in the legislative history of the Act signaling an intent to give special priority status to derivative beneficiaries who age out of "child" status

as a consequence of statutory limits on the number of visas issued each year. *Id.* at 37-38.

The Board therefore held that Section 1153(h)(3) did not apply to Wang's daughter. See 25 I. & N. Dec. at 38-39. The earlier F4 petition had been filed by Wang's sister, who had no relationship with Wang's adult daughter that would qualify her for a visa—that is, there is no family preference category for nieces (or nephews) of U.S. citizens. Thus, the petition filed by the aunt could not automatically convert to an existing category. Wang's F2B petition also could not retain the priority date of the original F4 petition, because the two petitions were filed by different petitioners. See *id.* at 35.

2. This certiorari petition arises out of suits filed by two groups of plaintiffs in federal district court in 2008 claiming that immigration authorities incorrectly denied relief under Section 1153(h)(3) to aged-out derivative beneficiaries of F3 and F4 petitions. The first suit was brought by parents who were primary beneficiaries of F3 and F4 petitions filed in the 1980s and 1990s, and who sought to retain the priority dates of those petitions with respect to F2B petitions they later filed on behalf of their adult sons and daughters. See App., *infra*, 11a, 68a-69a; see also *id.* at 68a-69a (noting that some of the sons and daughters also joined the suit as plaintiffs). The plaintiffs sought "declaratory and mandamus relief," alleging that USCIS arbitrarily and capriciously failed to grant the requested priority dates in violation of 8 U.S.C. 1153(h)(3). App., *infra*, 43a.

The second suit was brought by similarly situated parents seeking to benefit their aged-out children by forcing the government to assign priority dates from

decades-old F3 and F4 petitions to new F2B petitions. App., *infra*, 11a-12a, 44a. In that case, the district court certified a class consisting of "[a]liens who became lawful permanent residents as primary beneficiaries of [F3 and F4] visa petitions listing their children as derivative beneficiaries, and who subsequently filed [F2B] petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § [1153](h)(3)." *Id.* at 81a.

The district court granted summary judgment to the government in both cases. Noting that "[t]he factual circumstances of these cases are similar to those in *Wang*," the court concluded that Section 1153(h)(3) is ambiguous and held that the Board's interpretation of that provision in *Wang* was reasonable and entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). App., *infra*, 68a, 72a, 83a.

3. The cases were consolidated for appeal, see App., *infra*, 45a, and a Ninth Circuit panel unanimously affirmed the judgments in favor of the government, see *id.* at 60a. The panel found Section 1153(h) ambiguous and deferred to the Board's interpretation of the provision.

The panel rested its holding on a close reading of Section 1153(h)(3) and related provisions. The panel explained that Section 1153(h) could be read to apply to all derivative beneficiaries, but also could be read to exclude some beneficiaries from its reach: those who aged out of derivative-beneficiary status with respect to petitions that cannot "automatically be converted" to a family-preference category that covers a person

over the age of 21, without any need for the filing of a new petition by a different petitioner. App., *infra*, 50a-54a; see *id.* at 54a-55a (explaining that it is "entirely possible" to read Section 1153(h)(3) as granting priority date retention only where automatic conversion is also available). The panel concluded that *Chevron* deference to the Board's interpretation was appropriate. In the panel's view, the agency's reading of Section 1153(h)(3) "accords with the ordinary usage of the word 'automatic' to describe something that occurs without requiring additional input, such as a different petitioner," and represents "a reasonable policy choice for the agency to make." *Id.* at 57a-60a (quoting *Chevron*, 467 U.S. at 845).

4. a. The court of appeals granted rehearing en banc, vacated the panel opinion, and reversed and remanded in a divided 6-5 decision. The majority opinion concluded that "the plain language of the [Act] unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries" and that the Board's contrary interpretation "is not entitled to deference." App., *infra*, 3a; see *id.* at 24a ("Automatic conversion and priority date retention are available to all visa petitions identified in [Section 1153](h)(2).").

The majority primarily relied on cross-references between the various subsections of Section 1153(h). Section 1153(h)(1) sets forth a formula that calculates whether an alien's age is over 21 for purposes of the applicable "age requirement," and covers petitions described in Section 1153(h)(2); the "petition[s] described in [that] paragraph" are F2A petitions under 8 U.S.C. 1153(a)(2)(A) naming a child as a primary beneficiary and any petitions as to which a child is a

derivative beneficiary under 8 U.S.C. 1153(d). 8 U.S.C. 1153(h)(1)-(2). While Section 1153(h)(3) does not refer to paragraph (h)(2), it does refer to paragraph (h)(1), because it applies only if "the age of an alien is determined under paragraph (1) to be 21 years of age or older." 8 U.S.C. 1153(h)(3). The majority concluded that because "[paragraph] (h)(3) * * * cannot function independently," and "[paragraph] (h)(1) explicitly applies to the visas described in [paragraph] (h)(2)," Congress has clearly provided that paragraph (h)(2) defines which petitions are covered by paragraph (h)(3). App., *infra*, 15a-16a. Accordingly, the majority continued, "both aged-out F2A beneficiaries and aged-out derivative visa beneficiaries" may "automatically convert to a new appropriate category (if one is available)" and "retain the priority date of the original petitions for which they were named beneficiaries." *Id*. at 16a.

Having determined that the statutory language was clear, the majority addressed what it identified as questions of "impracticability" concerning the availability of "automatic[]" conversion under its reading of Section 1153(h). App., *infra*, 19a-23a (citing *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991)). The majority acknowledged that "[f]or an aged-out derivative beneficiary of an F3 or F4 petition, a subsequent petition will require a new petitioner"—the aged-out person's parent, assuming that after the parent's visa becomes available she is granted lawful permanent resident status and thus becomes eligible to file a petition for her adult child. App., *infra*, 18a. The majority also acknowledged that it may take some time for a new petition to be filed, and that such a petition might never be filed at all. See *id.* at 21a-22a

& n.4. But the majority did not believe that those issues "render[ed] automatic conversion impracticable," *id.* at 21a; it characterized them instead as merely "present[ing] administrative complexities that may inform USCIS's implementation." *Id.* at 22a; see *id.* at 21a-22a (stating that such complexities include "[t]he lag time while a parent receives his visa and adjusts status" to become a lawful permanent resident and "the possibility that conversion for an aged-out derivative is never possible"). Finally, the majority believed that its reading made more sense than the Board's narrower interpretation because, in the majority's view, Congress likely did not intend to benefit only a small category of aged-out persons and "barely modif[y] the regulatory regime that existed at the time the [Act] was enacted." *Id.* at 22a-23a (citing 8 C.F.R. 204.2(a)(4)).

The majority recognized the existence of a circuit conflict on the proper interpretation of Section 1153(h)(3). As the majority explained, its ruling accorded with that of the Fifth Circuit, while the Second Circuit reached the opposite result, ruling that Section 1153(h)(3) unambiguously bars relief for any alien whose existing petition cannot be "automatically converted," without the need for a new petitioner. App., *infra*, 12a-13a (citing *Khalid* v. *Holder*, 655 F.3d 363 (5th Cir. 2011), and *Li* v. *Renaud*, 654 F.3d 376 (2d Cir. 2011)). The majority concluded, however, that "[t]he existence of a circuit split does not itself establish ambiguity in the text of the [Act]." *Id.* at 17a.

The majority also acknowledged that its ruling would have a substantial adverse effect on aliens who receive no benefit from Section 1153(h)(3). If aged-out beneficiaries are permitted to "retain their priori-

ty dates when they join new preference category lines," the majority noted, that "will necessarily impact the wait time for other aliens in the same line," who will suddenly find more people ahead of them in the quest for visas that are made available only in small, "statutorily fixed" numbers. App., *infra*, 23a. The majority did not attempt to assess the equities of that result or to read the language of the statute in light of those equities. See *ibid.*

b. Five judges dissented in an opinion authored by Judge Milan Smith, Jr. The dissent agreed that Section 1153(h)(3) could be read to "include F3 and F4 derivative beneficiaries because this provision references the age-calculation formula in § 1153(h)(1), which covers derivative beneficiaries of F3 and F4 petitions through § 1153(h)(2)." App., *infra*, 27a-28a. But in the dissent's view, such a reading could not be squared with three other aspects of Section 1153(h)(3): "(1) that a petition must be converted 'to the appropriate category[';] (2) that only 'the alien's petition' may be converted; and (3) that the conversion process has to occur 'automatically.'" *Id.* at 28a. Automatic conversion is not possible, the dissent explained, because "[t]he children eligible to enter as derivative beneficiaries of their parents' visa petitions are the grandchildren, nieces, and nephews of United States citizens. When those children turn 21 and are no longer eligible to enter with their parents, there is no section 1153(a) category into which they fit on their own." *Id.* at 29a. The dissent also explained that although the majority relied on the assumption that the aged-out person's parent would become a lawful permanent resident and file a new petition naming that person, such a filing may not happen for some

time or at all, and "[a]n action cannot be 'automatic' if it depends on what a person *can* or *may* do, not what he or she definitely *will* do." *Id.* at 30a. The dissent criticized the majority for "ignoring statutory language contrary to its interpretation before finding the plain meaning clear." *Id.* at 28a, 31a-32a.

Finally, the dissent recognized the real-world implications of the majority's ruling, which would "shuffle the order in which individual aliens get to immigrate," and therefore require a change in the administration of visa waiting lists and a substantial increase in many aliens' already protracted wait times for visas, App., *infra*, 34a-35a: "If F3 and F4 derivative beneficiaries can retain their parents' priority date, they will displace other aliens who themselves have endured lengthy waits for a visa. What's more, these derivative beneficiaries—who do not have one of the relationships in section 1153(a) that would independently qualify them for a visa—would bump aliens who *do* have such a qualifying relationship." *Id.* at 35a.[3]

REASONS FOR GRANTING THE PETITION

By a 6-5 margin, the en banc Ninth Circuit has held that Section 1153(h)(3) grants special priority status to all aged-out derivative beneficiaries, refusing to defer to the contrary interpretation of the Board of Immigration Appeals. That ruling misinterprets the provision's text and misapplies *Chevron*—and, in doing so, deepens an existing conflict among the circuits.

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[3] The court of appeals stayed its mandate pursuant to Federal Rule of Civil Procedure 41, pending the filing and disposition of a petition for certiorari. 09-56786 Docket entry Nos. 100, 102 (9th Cir. 2012).

It also threatens serious disruption of the visa program by which relatives of U.S. citizens and lawful permanent residents immigrate to this country or adjust their status. This Court should grant review and correct the Ninth Circuit's error.

A. The Ninth Circuit Incorrectly Refused to Grant *Chevron* Deference to the Board's Interpretation Of Section 1153(h)(3)

1. a. The Ninth Circuit's conclusion that Section 1153(h) is unambiguous does not withstand scrutiny. Congress has not "unambiguously expressed" an intent to grant special priority status to aged-out derivative beneficiaries like those who seek relief in this case. *Chevron*, 467 U.S. at 842-843.

The en banc majority reached its conclusion without coming to terms with the text of Section 1153(h)(3) providing that "the alien's petition shall automatically be converted to the appropriate category." The existence of that specification of the manner in which Section 1153(h)(3) is to operate refutes the Ninth Circuit's conclusion that the provision unambiguously applies to all derivative beneficiaries. With respect to a derivative beneficiary named in an F3 or F4 petition who ages out, there is no "appropriate category" to which "the alien's petition"—that is, the *existing* petition covering the alien—can be "converted." In the case of an F3 petition (for married sons and daughters of U.S. citizens), the original petitioner is the aged-out person's U.S. citizen grandparent, and Congress has not provided for a citizen to file a petition to obtain an immigrant visa on behalf of a grandson or granddaughter. See 8 U.S.C. 1153(a). In the case of an F4 petition (for a U.S. citizen's brother or sister), the original petitioner is the aged-out person's U.S. citizen

aunt or uncle, and there likewise is no statutory category that allows a citizen to petition for a visa on behalf of a niece or nephew. See *ibid.*

In addition, as the en banc dissent explained (App., *infra*, 29a-31a), a change in classification could not take place "automatically" in those circumstances. If the parent of an aged-out derivative beneficiary of an F3 or F4 petition receives a visa and becomes a lawful permanent resident, the parent might then choose to file a new F2B petition naming the now adult son or daughter as a primary beneficiary. See 8 U.S.C. 1153(a). But such a new petition, filed by a new petitioner, cannot possibly be filed immediately after the derivative beneficiary ages out, see 8 U.S.C. 1153(h)(1); App., *infra*, 21a n.4, because some time must necessarily elapse between the date when the visa becomes available to the parent and the date when he or she establishes eligibility (if all requirements are met) and actually is granted lawful permanent resident status. See, *e.g.*, 8 U.S.C. 1153(g) (allowing up to one year for an alien to apply for a visa after one becomes available); 8 U.S.C. 1201(a), 1255 (governing processes by which an alien who qualifies for a visa can attain the right to reside in the country as a lawful permanent resident). Indeed, a new petition might never be filed at all; the aged-out person's parent might not submit an F2B petition even when capable of doing so. It is difficult to see how a shift from an F3 or F4 petition filed by one person to a new F2B petition that might or might not be filed later by a different person can reasonably be characterized as "automatic[]"—let alone as a "conver[sion]" of "the alien's petition." 8 U.S.C. 1153(h)(3); see App., *infra*, 30a.

That conclusion is reinforced by the well-understood meaning of the term "convert[]" in this area of immigration law: a seamless reclassification of a single petition from one currently valid category to another currently valid category. See *Agosto* v. *INS*, 436 U.S. 748, 754 (1978) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels the contrary." (citation omitted)). For instance, 8 C.F.R. 204.2(i), which was in place years before the Act was passed, provides for "[a]utomatic conversion of preference classification" from one category to another under circumstances (for example, a change in the beneficiary's marital status, or the naturalization of the petitioner) that do not require the filing of a new petition. And 8 U.S.C. 1151(f)(2), which was enacted alongside Section 1153(h), expressly contemplates "conversion" in that very sort of situation (naturalization of the parent). See also 8 U.S.C. 1151(f)(3), 1154(k)(1). The Board, with its extensive expertise in this area, agreed that "the term 'conversion' has consistently been used" to refer to a move from one visa category to another without the filing of a new petition. *Wang*, 25 I & N. Dec. at 35.[4]

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[4] Section 1153(h)(3) provides that "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. 1153(h)(3). That language cannot be read to provide unambiguously that priority-date retention and automatic conversion are separate benefits, such that retention is available even when conversion is not. See App., *infra*, 32a-33a, 54a. That is particularly true in light of the fact that Congress expressly unyoked those two benefits elsewhere in the Act. See

The cross-references in Section 1153(h) on which the en banc majority relied (App., *infra*, 15a-16a) do not provide an unambiguous statement of congressional intent that trumps these considerations. To qualify for relief under paragraph (h)(3), an aged-out person must have been subjected to the formula set out in paragraph (h)(1) and had his age computed as 21 or older. But it does not follow that every person whose age is computed under paragraph (h)(1)—that is, every beneficiary of a petition identified in paragraph (h)(2)—must also qualify for the distinct form of relief described in paragraph (h)(3). Rather, the persons who qualify for that further benefit can reasonably be understood to be a subset of beneficiaries of the persons covered by paragraph (h)(2). Particularly in light of the statutory language referring to "automatic[]" conversion, Section 1153(h)(3) cannot be said clearly to encompass the broader group.

Finally, there is no extra-textual reason to believe that Congress intended to grant the distinct benefit and preferred status of "grandfathered" priority dates to all aged-out former beneficiaries. Nothing in the legislative history indicates such an intent—a silence that would be surprising if Congress truly meant to enact a far-reaching change in immigration policy with substantial effects on aliens waiting for visas. See App., *infra*, 34a-35a; *Wang*, 25 I & N. Dec. at 36-38; pp. 28-32, *infra* (discussing effects of Ninth Circuit's

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8 U.S.C. 1154(k)(3) (stating that certain petitioners may retain their priority dates "[r]egardless of whether a petition is converted under this subsection or not"). In any event, "the concept of 'retention' of priority dates has always been limited" to a situation in which there was a successive petition filed by the same petitioner. *Wang*, 25 I & N. Dec. at 35; see, *e.g.*, 8 C.F.R. 204.2(a)(4).

interpretation of the statute). Rather, Congress was focused on ameliorating the effects of a particular problem relating to administrative delays in approving petitions, see *Wang*, 25 I. & N. Dec. at 36 (explaining that "the drive for the legislation was the then-extensive administrative delays in the processing of visa petitions and applications"); H.R. Rep. No. 45, 107th Cong., 1st Sess. 2 (2001), while avoiding "displac[ement]" with respect to aliens who were already "waiting patiently," *Wang*, 25 I. & N. Dec. at 37 (quoting 148 Cong. Rec. H4992 (daily ed. July 22, 2002)); see 147 Cong. Rec. H2902 (daily ed. June 6, 2001); see generally *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011, 2019 (2012).

b. The en banc majority was able to conclude that Section 1153(h)(3) is unambiguous only by shunting the discussion of any statutory language undermining that conclusion into a separate analysis of whether USCIS would be able to implement the different priority system the court's interpretation would mandate. See App., *infra*, 19a-23a. That was a misapplication of *Chevron*. In order to determine whether a statute is unambiguous to begin with, a court must employ the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, including examination of *all* of a provision's language as well as consideration of the statutory and regulatory structure into which it fits, see, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"). The court of appeals erred in breaking the provision into pieces and deeming it unambiguous on

the ground that one of the pieces, considered in isolation, appeared to have a clear meaning. That is especially true because the provision being interpreted here, 8 U.S.C. 1153(h)(3), consists of a single unitary sentence. To be sure, one tool of construction is an analysis of whether an interpretation is so unworkable or "so bizarre that Congress 'could not have intended' it," *Demarest* v. *Manspeaker*, 498 U.S. 184, 191 (1991) (citing *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982))—but that inquiry does not substitute for the basic requirement of a close reading of the entirety of the language that Congress chose.

In any event, the majority's attempt to explain why there are no difficulties associated with its understanding of how Section 1153(h)(3) operates is unconvincing. First, the majority stated that the reference in Section 1153(h)(3) to an "original petition" could be read to "suggest[] the possibility of a new petition," indicating that "automatic conversion could require more than just a change in visa category." App., *infra*, 20a. But the phrase "original petition" is most naturally read as a way of referring to a single petition *prior to* its conversion. 8 U.S.C. 1153(h)(3). Under that reading, Section 1153(h)(3) provides that when "the alien's petition" is transformed through conversion, it nevertheless "retain[s]" the priority date that was "issued upon receipt" of the petition in its "original" state. *Ibid.*

Second, the majority tried to brush past the difficulties associated with "automatic[]" conversion of a new F2B petition that might be filed on behalf of an adult son or daughter sometime after the date when that person had aged out as a derivative beneficiary under category F3 or F4. App., *infra*, 21a-22a. The

majority was forced to acknowledge, however, that uncertainty and "lag time" associated with the prospect of a new filing create "administrative complexities" and "unresolved procedural questions." *Ibid.* That is a source of statutory ambiguity—since the conversion that the majority envisioned would not be "automatic[]" within the ordinary meaning of that word—and not simply a problem of administration for the agency to surmount as best it may. See *id.* at 22a ("It is the agency's task to resolve these complications, not the court's.").

Finally, the majority expressed concern that an interpretation of Section 1153(h)(3) that gives force to the "automatic[]" conversion language would not significantly "modif[y] the regulatory regime that existed" when the provision was enacted. App., *infra*, 22a-23a. But there is no reason to believe that Congress wanted to make a major shift in policy, rather than to take the more modest step of giving statutory force to the agency's existing practices—including by use of terms with a recognized meaning in the immigration field. Cf. *Kucana* v. *Holder*, 130 S. Ct. 827, 838 (2010). The narrower interpretation adopted by the Board does add to the benefits already expressly conferred by regulation, making conversion "automatic[]," without requiring any additional petition (and corresponding fee), for aged-out derivative beneficiaries moving from the F2A category (which covers a lawful permanent resident's spouse and minor child) to the F2B category (which covers a lawful permanent resident's unmarried adult son or daughter). See 8 U.S.C. 1153(h)(3).[5]

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[5] See also, *e.g.*, Gov't C.A. Br. 38-39 (explaining that "[u]nder *Wang*, lawful permanent residents are no longer required to file

2. Because the en banc majority resolved the appeal at *Chevron* step one, it did not address whether the Board's interpretation of Section 1153(h)(3) in *Wang* is a reasonable one that is entitled to deference. See *Chevron*, 467 U.S. at 843-844; see also *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009) (according *Chevron* deference to Board's interpretation of a provision of the INA); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (same). The standard for what constitutes an expert agency's reasonable interpretation for *Chevron* purposes is broad, 467 U.S. at 843, and courts ordinarily defer to the Board's interpretation of immigration laws unless the interpretation is "clearly contrary to the plain and sensible meaning of the statute," *Mota* v. *Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008) (citation omitted).

As the en banc dissent (and the original Ninth Circuit panel) correctly explained, the Board's decision is indeed a reasonable one—a conclusion that follows

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separate petitions once their sons and daughters turn 21 years old"); Gov't C.A. Br. at 34 n.4, *Li* v. *Renaud*, *supra* (No. 10-2560-cv) (same). Prior to enactment of Section 1153(h)(3), the available relief was more limited. See 8 C.F.R. 204.2(a)(4) ("[I]f the [derivative beneficiary of an F2A petition] reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a case, the original priority date will be retained if the subsequent petition is filed by the same petitioner."). Although this regulation has not been revised following the enactment of the Act, its requirement that a new petition be filed for an aged-out derivative beneficiary of an F2A petition has been superseded by Section 1153(h)(3). This Office has been informed by the Department of Homeland Security and Department of State that administration of these provisions by agency personnel in the field in the wake of the Act has not always been uniform, but their position is, as required by Section 1153(h), that no separate petition is needed.

naturally from the interpretation of Section 1153(h)(3) set forth above. App., *infra*, 34a-35a, 57a-60a. The Board's reading of the provision gives meaning to the reference to automatic conversion, and does so in a manner consistent with past practice in immigration statutes and regulations. See *Wang*, 25 I. & N. Dec. at 39 (explaining that Section 1153(h)(3) affords relief to primary and derivative beneficiaries of F2A petitions who become eligible for F2B classification when they age out of child status). That reading also recognizes that a contrary interpretation would "not permit more aliens to enter the country or keep more families together," but would negatively affect many aliens who have been patiently waiting in visa lines for long periods of time. App., *infra*, 35a. And it makes a "reasonable policy choice," *Chevron*, 467 U.S. at 845, not to depart from past practice and disrupt visa administration in order to reduce the wait times for independent adults, see App., *infra*, 35a.

B. The Courts Of Appeals Are Split On The Meaning Of Section 1153(h)(3)

The ambiguity in Section 1153(h)(3) is highlighted by the varying interpretations reached by the courts of appeals that have considered its significance. The circuits are divided over whether Section 1153(h)(3) should be read to afford relief to derivative beneficiaries like the ones in this case, and review by this Court's is therefore warranted.

In *Li* v. *Renaud*, 654 F.3d 376 (2d Cir. 2011), the Second Circuit reached a result directly contrary to the Ninth Circuit's decision here. The plaintiff in *Li* was the primary beneficiary of an F2B family-preference petition filed by her father in 1994, at a time when her son was 15 years old; by the time a visa

became available, however, her son was 26 years old, and thus had aged out of derivative-beneficiary status. See *id.* at 379. Because there is no family-preference category under which a grandfather can seek a visa for his grandson, a new petition was required. See *id.* at 381. When the plaintiff—by then a lawful permanent resident—filed a separate F2B petition in 2008 naming her adult son as the primary beneficiary, she argued that he was entitled to the priority date associated with her father's earlier petition filed on her behalf. See *id.* at 379. The Second Circuit rejected that argument, ruling that Section 1153(h) did not create "a statutory right to have [the] 2008 petition receive a 1994 priority date." *Id.* at 380; see *id.* at 382-383.

The Second Circuit read Section 1153(h)(3) to unambiguously *reject* the very reading adopted by the Ninth Circuit, and thus to *deny* special relief to aged-out derivative beneficiaries who seek to "retain" a priority date "to use for a different family preference petition filed by a different petitioner." *Li*, 654 F.3d at 382-383. The court first explained that automatic conversion and retention of priority date are not "distinct and independent" statutory "benefits," noting that Congress knew how to "decouple" those benefits but had "clearly" chosen not to do so in the provision at issue. *Id.* at 383-384 (citing 8 U.S.C. 1154(k)). The court then considered whether the plaintiff's petition could automatically be "converted to the appropriate category," 8 U.S.C. 1153(h)(3), and concluded that it could not. The court pointed out that "[a]s used in the [Act] and prior regulations," that phrase "refers to a petition in which the category is changed, but not the petitioner." 654 F.3d at 384; see also *id.* at 384-385.

In the court's view, then, that language "unambiguously expressed" Congress's intent to include only "a change—without need for an additional petition—from one classification to another, not from one person's family sponsored petition to another." *Id.* at 384-385.

In sharp contrast, in *Khalid* v. *Holder*, 655 F.3d 363 (5th Cir. 2011), the Fifth Circuit expressly rejected the Second Circuit's reasoning in *Li* and reached the same conclusion as the en banc Ninth Circuit in the decision below. See *id.* at 374-375. The case involved a typical aging-out fact pattern: Khalid's mother was named as the primary beneficiary of an F4 petition filed by Khalid's aunt in 1996, at which time Khalid was 11 years old. See *id.* at 365. His mother did not reach the front of the visa line until 2007, however, and by the time she became a lawful permanent resident Khalid was 22 years old. See *id.* at 366. Immigration authorities denied Khalid's request to assign a priority date of 1996 to the new F2B petition his mother filed on his behalf in 2007. See *ibid.*; see also *id.* at 368 (stating that "[t]he facts of *Matter of Wang* are essentially identical to the facts of this case").

Because the Fifth Circuit found that Section 1153(h)(3) unambiguously entitled Khalid to the relief he sought, the court of appeals did not progress beyond step one of the *Chevron* analysis. The court acknowledged that Section 1153(h)(3) does not internally define which petitions qualify for automatic conversion and priority-date retention, since that provision "refers only to 'the alien's petition' and 'the original petition.'" 655 F.3d at 370. Like the Ninth Circuit en banc majority, however, the court placed

heavy reliance on the fact that Section 1153(h)(3) refers to the formula set forth in Section 1153(h)(1), and Section 1153(h)(2) defines which petitions are covered under Section 1153(h)(1): any F2A petition naming a child as a primary beneficiary as well as any petition under which a child is a derivative beneficiary. See *ibid.*; see also 8 U.S.C. 1153(h)(2). The court concluded that paragraph "(h)(3) must operate on this same set of petitions"—and that the Second Circuit had erred by failing to recognize that point. 655 F.3d at 371, 373-375; see *id.* at 371 (noting various "parallels" between the subsections of Section 1153(h)); *id.* at 372 (stating that "past practices regarding conversion and retention" might "factor into the analysis" if "the text were more murky"). The Fifth Circuit was also skeptical of the Second Circuit's reading because it would confer only a "meager benefit." *Id.* at 374 (citing 8 C.F.R. 204.2(a)(4)).

These various court of appeals decisions, which arrive at such different conclusions about the purportedly "unambiguous" meaning of Section 1153(h)(3), cannot be reconciled with each other. Cf. *Robles-Tenorio* v. *Holder*, 444 Fed. Appx. 646, 649 (4th Cir. 2011). This Court's review is warranted to clarify the meaning of Section 1153(h)(3) and to determine whether the Board's considered interpretation of that provision is entitled to *Chevron* deference. See *Negusie* v. *Holder*, 555 U.S. 511, 517 (2009) ("Judicial deference in the immigration context is of special importance."); *Chen* v. *Mukasey*, 524 F.3d 1028, 1033 (9th Cir. 2008) (stating that national uniformity is "paramount" in applying immigration laws (quoting *Kaganovich* v. *Gonzales*, 470 F.3d 894, 897 (9th Cir. 2006)).

C. The Ninth Circuit's Rule, If Allowed To Stand, Would Have A Substantial Effect On The Administration Of The Immigration Laws And The Availability of Visas To Other Aliens

If the Ninth Circuit's decision were put into effect, the consequences would be serious and far-reaching. It does not appear to be possible, as a practical matter, to implement that decision in a limited way. Rather, to carry out the Ninth Circuit's instructions as to the proper operation of Section 1153(h)(3), the visa-waiting system would likely have to be overhauled. Accordingly, the priority dates of thousands of aliens awaiting visas would have to be adjusted, and as a result other aliens would experience significantly increased waiting times, thus disrupting the settled expectations of those aliens and their U.S.-citizen or lawful-permanent-resident family members. The reordering of the visa waiting lines and the processing of a large number of petitions with new, earlier priority dates would also place a tremendous administrative burden on the responsible agencies.

The number of aliens who could obtain earlier priority dates under the Ninth Circuit's interpretation of Section 1153(h)(3) could be in the tens of thousands, or even higher. See generally U.S. Dept. of State, Immigrant Waiting List by Country 6-7, http://www.travel.state.gov/pdf/WaitingListItem.pdf (last visited Jan. 24, 2013) (stating that approximately 90,000 aliens immigrate in the F3 and F4 categories every year). There is, however, no mechanism in place to track which pending petitions include as derivative beneficiaries persons who have since aged out, and no way of knowing how many new visa petitions or applications naming them would be filed in the future. Indeed, one

consequence of the Ninth Circuit's ruling might be that there is no time limit on an aged-out beneficiary's ability to claim an "original" priority date; under that ruling, years or even decades could pass between the time that the beneficiary aged out and the time that the claim is asserted. See App., *infra*, 74a; see also 8 U.S.C. 1153(g).

The family-preference visa waiting lines that would be affected by the Ninth Circuit's interpretation of Section 1153(h)(3) are those for F1, F2B, and F3 visas.[6] Most of the aged-out beneficiaries who would directly benefit by obtaining an earlier priority date would likely do so via the F2B line, which covers petitions filed by lawful permanent residents on behalf of their unmarried adult sons and daughters. See 8 U.S.C. 1153(a). Some of those beneficiaries are already waiting in that line as a result of new F2B petitions filed on their behalf, but would now claim an earlier priority date than the one they are currently accorded. Others would join the line for the first time and claim the priority date under which their parents gained visas, because some number of new lawful

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[6] Although the cases before the Ninth Circuit involved family-preference petitions, the language in the en banc decision could be read to extend to employment-based visa petitions, which operate similarly and which are covered by subsection (b) of Section 1153. See App., *infra*, 24a; 8 U.S.C. 1153(h)(2) (describing with respect to derivative beneficiaries "a petition filed under section 1154 of this title for classification of the alien's parent under subsection (a), (b), or (c) of this section"); *Matter of Jyoti R. Patel*, No. A089 726 558, at 1-3 (B.I.A. Jan. 11, 2011) (unpub.) (relying on *Wang* to reject argument made by aged-out derivative beneficiary of employment-based petition filed on his mother's behalf). Under such a reading, the effects described below would be even more pronounced.

permanent residents never filed at all for an F2B preference visa for their now adult sons and daughters because the waiting times were too long. See generally Immigrant Waiting List by Country, *supra*. Other aged-out beneficiaries who would claim their parents' old priority dates are waiting in or would newly join the F1 line (for unmarried adult sons and daughters of U.S. citizens) or the F3 line (for married sons and daughters of U.S. citizens), see 8 U.S.C. 1153(a), because their parents originally qualified as lawful permanent residents but subsequently became naturalized citizens, see 8 U.S.C. 1154(k); 8 U.S.C. 1427(a); App., *infra*, 82a n.1.

The result would be that many aliens waiting in those lines would have their places in line pushed back. As the en banc dissent pointed out, changing priority dates is a "zero-sum game," App., *infra*, 35a; for every person who would be inserted closer to the front of the line as a result of the Ninth Circuit's decision, another person would be moved back. As of November 1, 2012, there were 288,705 F1 petitions, 486,597 F2B petitions, and 830,906 F3 petitions designated for consular processing overseas for which beneficiaries are awaiting visa numbers—many of which could be subject to reordering. See Immigrant Waiting List by Country, *supra*, at 2. Additional F1, F2B, and F3 petitions designated for processing in the United States (because their beneficiaries are already present in this country) would be subject to the same treatment.

Aliens pushed back in the line might see their waiting times increase substantially. Congress has made 226,000 family-sponsored visas available each year, of which only approximately 26,000 are F2B visas, and

has imposed additional per-country limits for each category. See 8 U.S.C. 1151-1153; see also 8 U.S.C. 1151(c) (explaining calculation governing available number of family-sponsored visas). Currently, for instance, visas are not available to Mexican nationals in the F2B category unless they have a priority date of November 22, 1992, or earlier. See U.S. Dept. of State, Visa Bulletin for Jan. 2013, http://travel.state.gov/visa/bulletin/ bulletin_5834.html (last visited Jan. 24, 2013). If a large number of Mexican nationals who now have priority dates after November 1992 were suddenly entitled to earlier priority dates under the Ninth Circuit's reading of Section 1153(h)(3) because they aged out under some earlier petition, then the cut-off date would retrogress in order to allow those persons to be processed without exceeding the yearly limit on F2B visas. That means that an alien outside the scope of Section 1153(h)(3) with a priority date of December 1992, whose priority date was about to become "current" and who has already been waiting for two decades, would have to wait an additional (and likely significant) amount of time.

There are undoubtedly inequities associated with such a reshuffling. See, *e.g.*, Christina A. Pryor, Note, *"Aging Out" of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act*, 80 Fordham L. Rev. 2199, 2233-2236 (2012) (setting out an example in which application of the Ninth Circuit's interpretation would mean that A's son gets a visa number before B's son, even though B became a lawful permanent resident years earlier than A and filed a petition naming her son earlier than A did, and even though B and her son have been separated longer than A and her son have).

It is clear, moreover, that allowing aged-out beneficiaries to retain "original" priority dates indefinitely would represent a significant shift in immigration policy. See App., *infra*, 59a. Derivative beneficiaries who are under the age of 21 are entitled only to "accompany[]" or "follow[] to join" their parents, so that parents and minor children are not separated. 8 U.S.C. 1153(d); see *Santiago* v. *INS*, 526 F.2d 488, 491 (9th Cir. 1975) ("If Congress had wished to equate derivative preferences with actual preferences, the words 'accompanying, or following to join' would be absent from this statute."), cert. denied, 425 U.S. 971 (1976). The Ninth Circuit's ruling, however, treats aged-out derivative beneficiaries as if they were independently entitled to a preference based on their status as a grandchild, niece, or nephew of a U.S. citizen—relationships that do not fall into any existing family-preference category established by Congress. See App., *infra*, 34a-35a, 59a-60a.

In short, implementing the Ninth Circuit's ruling would likely create substantial disruptions to the administration of the visa system and the settled expectations of many aliens who are beneficiaries of approved visa petitions and have been waiting for a visa to become available. There is nothing that the relevant agencies could do to ameliorate that problem. In particular, the additional delay that many aliens would face would result from application of the strict statutory limits on the number of visas that are available each year, and not from any agency action (or inaction). This Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos.: 09-56786, 09-56846

ROSALINA CUELLAR DE OSORIO; ELIZABETH MAGPANTAY; EVELYN Y. SANTOS; MARIA ELOISA LIWAG; NORMA UY; RUTH UY, PLAINTIFFS-APPELLANTS

v.

ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; JANET NAPOLITANO, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, HILLARY RODHAM CLINTON, SECRETARY OF STATE, DEFENDANTS–APPELLEES

TERESITA G. COSTELO; LORENZO P. ONG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS–APPELLANTS

v.

JANET NAPOLITANO, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; LYNNE SKEIRIK, DIRECTOR, NATIONAL VISA CENTER; CHRISTINA POULOS, ACTING DIRECTOR, CALIFORNIA SERVICE CENTER, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; HILLARY RODHAM CLINTON, SECRETARY OF STATE, DEFENDANTS–APPELLEES

Filed: Sept. 26, 2012

OPINION

Before: ALEX KOZINSKI, Chief Judge, HARRY PREGERSON, M. MARGARET MCKEOWN, KIM MCLANE WARDLAW, WILLIAM A. FLETCHER, RAYMOND C. FISHER, RONALD M. GOULD, RICHARD A. PAEZ, JOHNNIE B. RAWLINSON, MILAN D. SMITH, JR., and MARY H. MURGUIA, Circuit Judges.

Opinion by Judge MURGUIA; Dissent by Judge MILAN D. SMITH, JR.

MURGUIA, Circuit Judge, with whom PREGERSON, WARDLAW, FISHER, GOULD and PAEZ, Circuit Judges, join in full:

Appellants became lawful permanent residents and immigrated to the United States. However, due to visa quotas and a serious backlog, by the time Appellants received their family-sponsored visas, their children were no longer eligible to accompany them as recipients of derivative visas, which are available only to children under the age of twenty-one. Their children had "aged out" of eligibility.

The question before us is whether these children are entitled to relief under the Child Status Protection Act ("CSPA"), 8 U.S.C. § 1153(h). The CSPA provides, among other things, that when certain aged-out aliens apply for visas under a new category for adults, they may retain the filing date of the visa petition for which they were listed as derivative beneficiaries when they were children. This ensures that visas are

available quickly, rather than requiring the now-adult aliens to wait many more years in a new visa line.

The United States Citizen and Immigration Services ("USCIS") denied Appellants' requests for priority date retention under the CSPA. USCIS relied on the Board of Immigration Appeals' ("BIA") decision in *Matter of Wang,* 25 I. & N. Dec. 28 (BIA 2009) that the CSPA does not apply to all derivative beneficiaries. The district court, deferring to the BIA's interpretation, granted summary judgment to USCIS in two separate cases. We reverse.

We conclude that the plain language of the CSPA unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries. The BIA's interpretation of the statute conflicts with the plain language of the CSPA, and it is not entitled to deference.

I. Family-based immigration overview

We begin with an overview of family-based immigration. Family-sponsored immigration allows U.S. citizens and lawful permanent residents ("LPRs") to file visa petitions on behalf of certain qualifying alien relatives. The Immigration and Nationality Act ("INA") limits the total number of family-sponsored immigrant visas issued each year to 480,000, and directs that natives of any single foreign state may not receive more than seven percent of these visas. 8 U.S.C. §§ 1151(c), 1152(a)(2). The INA also establishes preference categories based on the relationship between citizens or LPRs and their alien relatives, and limits the number of family-sponsored immigrant visas that can be granted to members of each preference

category. *Id.* § 1153(a). Unlike other types of family-sponsored visa applicants, children, spouses, and parents (i.e. "immediate relatives") of U.S. citizens are not subject to the annual visa limits. *Id.* § 1151(b)(2)(A)(i).

For non-immediate relatives of citizens, the INA establishes the following family visa preference categories:

> F1: Unmarried sons and daughters of U.S. citizens
>
> F2A: Spouses and children of LPRs
>
> F2B: Unmarried sons and daughters of LPRs
>
> F3: Married sons and married daughters of U.S. citizens
>
> F4: Brothers and sisters of U.S. citizens

Id. § 1153(a).

After a U.S. citizen or LPR files a visa petition on behalf of a relative, USCIS determines if a qualifying relationship exists between the citizen or LPR petitioner and the alien relative who is the primary beneficiary. If so, USCIS puts the beneficiary "in line" in the appropriate visa category. The beneficiary's place in line is determined by the date the petition is filed, which is known as the "priority date." Due to statutory limits for each visa category and a substantial backlog, it may be many years before a petition's priority date becomes "current," meaning that a visa is available for the beneficiary named in the petition. *See, e.g.,* U.S. Dep't of State, Visa Bulletin, August 2012, *available at* http://www.travel.state.gov/visa/bulletin/bulletin_5749.html (showing delays for mem-

bers of all visa categories, including waits of over 10 years for nationals of several countries in certain categories).

A petition can also include the spouse or children of the primary beneficiary. The primary beneficiary's spouse or children may then receive derivative visas at the same time that the primary beneficiary receives a visa. 8 U.S.C. § 1153(d) ("A spouse or child . . . shall . . . be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent."). The INA defines a "child" as an unmarried person under the age of twenty-one. 8 U.S.C. § 1101(b)(1). The primary beneficiary's son or daughter can only receive a derivative visa if he or she is under twenty-one when the parent's priority date becomes current. Often children who qualify for derivative visas at the time a petition is filed on their parent's behalf are over the age of twenty-one by the time their parent receives the visa, and therefore may not immigrate to the United States with their parent. This is referred to as "aging out" of visa eligibility. Aging out also affects children who are the primary beneficiaries of F2A petitions, as they are no longer eligible for an F2A visa (for spouses and children of LPRs) once they turn twenty-one. Because some delays are many years long, children may age out even if they were very young when a petition was filed on their parent's behalf.

II. The Child Status Protection Act

In 2002, Congress passed the Child Status Protection Act ("CSPA"). Pub. L. No. 107–208, 116 Stat. 927 (2002). This appeal concerns a provision of the

CSPA entitled "Rules for determining whether certain aliens are children," codified at 8 U.S.C. § 1153(h).[1]

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[1] The CSPA states in relevant part:

(h) Rules for determining whether certain aliens are children

(1) In general

For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 1101(b)(1) of this title shall be made using—

(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by

(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

(2) Petitions described

The petition described in this paragraph is—

(A) with respect to a relationship described in subsection (a)(2)(A) of this section, a petition filed under section 1154 of this title for classification of an alien child under subsection (a)(2)(A) of this section; o

(B) with respect to an alien child who is a derivative beneficiary under subsection (d) of this section, a petition filed under section 1154 of this title for classification of the alien's parent under subsection (a), (b), or (c) of this section.

(3) Retention of priority date

Subsection (h) addresses two sources of delay that can cause a beneficiary to age out of child status: (1) USCIS processing delays and (2) the wait times between USCIS's approval of a visa petition and when a visa becomes available. Three parts of subsection (h) are relevant to our discussion.

The first paragraph of subsection (h) addresses the more minor delay that occurs while USCIS processes a visa application. 8 U.S.C. § 1153(h)(1). Subsection (h)(1) establishes the method to determine an alien's age "[f]or purposes of subsections (a)(2)(A) and (d) [of § 1153]," which respectively address F2A visas (for the children of LPRs), *id.* § 1153(a)(2)(A), and derivative visas (for the children of primary beneficiaries), *id.* § 1153(d). Subsection (h)(1) provides that for purposes of determining if a visa applicant qualifies as a child, the alien's "age" is his age on the date the visa becomes available minus "the number of days in the period during which the applicable petition" was pending after being filed. *Id.* § 1153(h)(1). Subsection (h)(1) thus ensures that an alien does not lose

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If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

(4) Application to self-petitions

Paragraphs (1) through (3) shall apply to self-petitioners and derivatives of self-petitioners.

"child" status due to administrative delays in the processing of his parent's visa petition.

Subsection (h)(2) defines the kinds of visa petitions to which the age-reduction formula in subsection (h)(1) applies. *Id.* § 1153(h)(2). Subsection (h)(2)(A) identifies F2A petitions, which are for children of LPRs. *Id.* § 1153(h)(2)(A). Subsection (h)(2)(B) identifies all other categories of visas for which a child may be a derivative beneficiary (family, employment, and diversity-based visa petitions). *Id.* § 1153(h)(2)(B).

Subsection (h)(3), the provision at issue in this appeal, grants alternative relief to aliens who are still determined to be twenty-one or older after calculating their age pursuant to the age reduction formula in subsection (h)(1). It states: "If the age of an alien is determined under [subsection (h)(1)] to be 21 years of age or older for the purposes of subsections (a)(2)(A) [children of LPRs] and (d) [derivative beneficiaries], the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." *Id.* § 1153(h)(3). In other words, subsection (h)(3) requires that when aliens age out of child status for purposes of their original petition, their applications be automatically converted to the new appropriate category for adults. Additionally, it enables such aliens to retain the priority date assigned to their original petition. The effect of this older priority date is that the beneficiary is placed at or near the front of the visa line, and a visa would likely be available immediately or soon. Without this automatic conversion and priority date retention, the alien

will have to go to the back of the line for the new category, and might wait many more years for a visa.

The question presented in this appeal is whether the automatic conversion and date retention benefits provided by subsection (h)(3) apply only to aged-out F2A petition beneficiaries, or whether they also apply to derivative beneficiaries of the other family visa categories.

III. *Matter of Wang*

The BIA answered this question in *Matter of Wang,* 25 I. & N. Dec. 28 (2009). The BIA held that unlike subsections (h)(1) and (h)(2), "which when read in tandem clearly define the universe of petitions that qualify for the 'delayed processing formula,' the language of [subsection (h)(3)] does not expressly state which petitions qualify for automatic conversion and retention of priority dates." *Id.* at 33. Based on this observation alone, the BIA found the statute ambiguous and turned to the Department of Homeland Security's past regulatory practice and the CSPA's legislative history. *Id.*

The BIA noted that "the phrase 'automatic conversion' has a recognized meaning" in immigration regulations. *Id.* at 34. According to the BIA, the term "conversion" has consistently meant that a visa petition converts from one visa category to another without the need to file a new petition, and priority date retention has always applied only to subsequent visa petitions filed by the same petitioner. *Id.* at 34-35. The BIA offered several examples. Under 8 C.F.R. § 204.2(i)(3), if an LPR petitioner becomes a citizen, his adult son or daughter's visa petition automatically

converts from an F2B petition (for adult sons and daughters of LPRs) to an F1 petition (for adult sons and daughters of citizens), and retains its original priority date. In this case, the identity of the petitioner remains the same. Additionally, 8 C.F.R. § 204.2(a)(4) allows an aged-out derivative beneficiary of an F2A spousal petition to retain his priority date as long as the original petitioner (his parent) submits an F2B visa petition on his behalf. Again, the petitioner remains the same. *Wang,* 25 I. & N. Dec. at 35. The BIA assumed that when Congress enacted subsection (h)(3), it understood past usage of these regulatory terms. *Id.*

The BIA also surveyed the legislative history of the CSPA and concluded that "there is no indication in the statutory language or legislative history of the CSPA that Congress intended to create a mechanism to avoid the natural consequence of a child aging out of a visa category because of the length of the visa line." *Id.* at 38. Finding no indication that Congress attempted to "expand on the historical application of automatic conversion and retention of priority dates for visa petitions," the BIA declined "to read such an expansion into the statute." *Id.*

Under the BIA's interpretation of subsection (h)(3), only subsequent visa petitions that do not require a change of petitioner may convert automatically to a new category and retain the original petition's priority date. Automatic conversion and priority date retention would thus be only available to F2A petition beneficiaries, including primary child beneficiaries and derivative beneficiaries of F2A spousal petitions. This is because these aged-out beneficiaries may be-

come primary beneficiaries of an F2B petition filed by the same petitioner.

IV. Factual background

Appellants' cases illustrate the question before us. Rosalina Cuellar de Osorio's citizen mother filed a petition for an F3 visa (for a married daughter of a citizen) on her behalf in May 1998. Cuellar de Osorio's son, who was then thirteen, was listed on the petition as a derivative beneficiary. Cuellar de Osorio's visa was approved in June 1998, but her priority date did not become current until November 2005. By then, her son was twenty-one and as a result was ineligible for a derivative visa. Cuellar de Osorio became an LPR and immigrated to the United States in August 2006. In July 2007, Cuellar de Osorio filed an F2B petition for her son, now the adult son of an LPR, and requested that he retain the May 1998 priority date of her original F3 petition in which he had been named a derivative beneficiary. USCIS did not grant priority date retention, so Cuellar de Osorio's son was placed in the back of the F2B line, requiring him to wait several more years for a visa. Cuellar de Osorio and several other similarly situated petitioners sued USCIS. Deferring to the BIA's decision in *Matter of Wang,* under which the plaintiffs were not entitled to automatic conversion and priority date retention, the district court granted summary judgment to USCIS.

Teresita Costelo was the beneficiary of an F3 visa petition filed by her citizen mother in January 1990. Costelo's two daughters, then aged ten and thirteen, were listed as derivative beneficiaries. By the time Costelo received her visa in 2004, both daughters were

over twenty-one. Costelo immigrated and became an LPR, filed F2B petitions for her daughters, and requested retention of the 1990 priority date of the prior F3 visa petition.

Lorenzo Ong's citizen sister filed an F4 petition on his behalf in 1981. At the time, Ong's daughters were ages two and four. By the time Ong's priority date became current in 2002, his daughters had aged out of derivative visa eligibility. Ong became an LPR and, in March 2005, he filed F2B petitions on behalf of his adult daughters and later requested retention of the 1981 priority date. USCIS did not respond to the priority date request. Costelo and Ong sued. The district court certified a class and granted the Government's motion for summary judgment, again deferring to *Matter of Wang.*

V. Second and Fifth Circuit decisions

Since the BIA decided *Matter of Wang,* two of our sister circuits have considered subsection (h)(3). Though the Second and Fifth Circuits reached different conclusions as to the scope of subsection (h)(3)'s applicability, neither found the language of the CSPA ambiguous and therefore neither deferred to *Matter of Wang. See Khalid v. Holder,* 655 F.3d 363 (5th Cir. 2011); *Li v. Renaud,* 654 F.3d 376 (2d Cir. 2011).

The Fifth Circuit concluded that the unambiguous language of the CSPA extends automatic conversion and priority date retention to both F2A beneficiaries and aged-out derivative beneficiaries of other family-sponsored petitions. *Khalid,* 655 F.3d at 374-75. The Fifth Circuit held that because subsection (h)(2) explicitly encompasses both F2A visas and

all derivative visas, and subsections (h)(1), (h)(2), and (h)(3) are interdependent, "the statute, as a whole, clearly expresses Congress' intention about the universe of petitions covered by (h)(3)," and "there is no room for the agency to impose its own answer to the question." *Id.* at 371 (internal quotation marks omitted). The Fifth Circuit thus declined to defer to the BIA's interpretation of subsection (h)(3), instead holding that automatic conversion is available for derivative beneficiaries of all family petitions, even when this necessitates a change in the identity of the petitioner.

In contrast, the Second Circuit held that an aged-out derivative beneficiary of an F2B petition was not entitled to automatic conversion and priority date retention when his mother filed an F2B petition that named him as a primary beneficiary. *Li,* 654 F.3d at 383. The Second Circuit concluded that the appellant's petition could not be automatically converted because "the phrase conversion to an appropriate category refers to a petition in which the category is changed, but not the petitioner." *Id.* at 384. According to the Second Circuit, a change in the petitioner forecloses the possibility of automatic conversion.

VI. Standard of Review

We review de novo a district court's grant of summary judgment. *Herrera v. U.S. Citizenship & Immigration Servs.,* 571 F.3d 881, 885 (9th Cir. 2009). We review the BIA's precedential decision interpreting a governing statute according to the principles of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.

2d 694 (1984). *INS v. Aguirre-Aguirre,* 526 U.S. 415, 424, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999). Pursuant to the *Chevron* two-step analysis, we first ask if the statute is unambiguous as to the question at issue. *Chevron,* 467 U.S. at 842-43, 104 S. Ct. 2778. If it is, that is the end of our inquiry. *Id.* Only if the statute is ambiguous do we proceed to step two and ask "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. 2778.

VII. Discussion

We begin by determining whether the CSPA is unambiguous as to whether the priority date retention and automatic conversion benefits in subsection (h)(3) extend to aged-out derivative beneficiaries of all family visa petitions. To determine if Congress has spoken unambiguously, we begin with the plain language of the statute itself. *N. Cal. River Watch v. Wilcox,* 633 F.3d 766, 772-73 (9th Cir. 2011).

Subsection (h)(3) states: "Retention of priority date. If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. § 1153(h)(3).

The Government argues that the language of subsection (h)(3) is ambiguous because, as the BIA held, it does not specify the petitions that qualify for automatic conversion and retention of priority dates. *See Wang,* 25 I. & N. Dec. at 33 (subsection (h)(3) "does

not expressly state which petitions qualify for automatic conversion and retention of priority dates"). The Government is correct that subsection (h)(3) itself does not identify the kinds of visa petitions to which it applies, through either its own terms or by explicit reference to another definitional section. In contrast, subsection (h)(1), which establishes the age-reduction formula, states that it applies to the categories of visas named in subsection (h)(2). 8 U.S.C. § 1153(h)(1). In turn, subsection (h)(2) identifies both F2A beneficiaries (children of LPRs) and child derivative beneficiaries of all other visa categories. *Id.* § 1153(h)(2).

However, we do not assess subsection (h)(3) in a vacuum, but rather consider the text in its statutory context. *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000). The effect of subsection (h)(3) is explicitly contingent upon the operation of subsection (h)(1). The first words of subsection (h)(3) read "[i]f the age of an alien is determined under [subsection (h)(1)] to be 21 years of age or older," then the alien's petition will be automatically converted to the appropriate category and he will retain the original priority date. 8 U.S.C. § 1153(h)(3). By subsection (h)(3)'s own terms, then, an alien is entitled to automatic conversion and priority date retention under subsection (h)(3) only if he is determined to be over twenty-one after applying the reduction calculation in subsection (h)(1). *Id.*; *see also Khalid,* 655 F.3d at 370 ("The benefits of automatic conversion and priority date retention are explicitly conditioned on a particular outcome from the formula in (h)(1) . . . .").

Subsection (h)(3) thus cannot function independently; it is triggered only when an application of subsection (h)(1)'s subtraction formula determines that the alien is over twenty-one. In turn, subsection (h)(1) explicitly applies to the visas described in subsection (h)(2), which include both F2A visas and derivatives of the other visa categories. Therefore, both aged-out F2A beneficiaries and aged-out derivative visa beneficiaries may automatically convert to a new appropriate category (if one is available), and the visa applicants may retain the priority date of the original petitions for which they were named beneficiaries. The plain language of the statute thus conclusively resolves the question before us.

Our interpretation is further bolstered by Congress's use of the identical phrase "for [the] purposes of subsections (a)(2)(A) and (d)" in both subsections (h)(1) and (h)(3). This phrase refers to both F2A petitions for children (established by 8 U.S.C. § 1153(a)(2)(A)) and derivative visas for the children of primary beneficiaries of all visa categories (established by 8 U.S.C. § 1153(d)). It is undisputed that subsection (h)(1) applies to all derivative beneficiaries, and to accord a different meaning to the phrase as used in subsection (h)(3) violates the "presumption that a given term is used to mean the same thing throughout a statut." *Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994). We therefore read Congress's repeated references to "subsections (a)(2)(A) and (d)" as expressions of its intent to extend automatic conversion and priority date retention to all family-sponsored derivative beneficiaries.

The existence of a circuit split does not itself establish ambiguity in the text of the CSPA. *See, e.g., Roberts v. Sea–Land Servs., Inc.,* — U.S. —, 132 S. Ct. 1350, 182 L. Ed. 2d 341 (2012) (holding that § 906(c) of the Longshore and Harbor Workers' Compensation Act is unambiguous notwithstanding disagreement between the Fifth, Ninth, and Eleventh Circuits about its meaning); *Mohamad v. Palestinian Auth.,* — U.S. —, 132 S. Ct. 1702, 182 L. Ed. 2d 720 (2012) (holding that the term "individual" as used in the Torture Victim Protection Act unambiguously encompasses only natural persons despite disagreement among several Circuits); *see also Reno v. Koray,* 515 U.S. 50, 64-65, 115 S. Ct. 2021, 132 L. Ed. 2d 46 (1995) ("A statute is not 'ambiguous for purposes of lenity merely because' there is 'a division of judicial authority' over its proper construction.") (quoting *Moskal v. United States,* 498 U.S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990)). Like the Fifth Circuit, we recognize that the Second Circuit concluded that a petition cannot be automatically converted where a change in petitioner is required, and we respectfully disagree. *See Khalid,* 655 F.3d at 373 (citing *Li,* 654 F.3d at 383). The Second Circuit's decision not to consider the interrelatedness of sections (h)(1), (h)(2) and (h)(3) does not undermine our conclusion that the statute, read as a whole, unambiguously answers the question before us.

The Government also contends the CSPA becomes ambiguous when its terms are applied to certain derivative beneficiaries. According to the Government, automatic conversion and priority date retention cannot be practicably applied to F3 and F4 derivative beneficiaries because, for a category conversion to be automatic, it must involve the same petition and the

same petitioner. Under this definition, automatic conversion would not be possible for aged-out derivative beneficiaries of F3 and F4 petitions because there is no qualifying relationship between the original visa petitioner and the aged-out beneficiary.

For an aged-out derivative beneficiary of an F3 or F4 petition, a subsequent petition will require a new petitioner. In the case of an F3 petition, the derivative beneficiary's adult parent is the primary beneficiary, and the derivative beneficiary's U.S. citizen grandparent is the petitioner. Once the derivative beneficiary turns twenty-one, he has no qualifying relationship with the original petitioner because a U.S. citizen cannot petition on behalf of his adult grandchild. For an F4 petition, the petitioner is a U.S. citizen, the primary beneficiary is the brother or sister of the citizen, and the derivative beneficiary is the child of the primary beneficiary and the niece or nephew of the petitioner. After the derivative beneficiary turns twenty-one, there is no qualifying relationship between a citizen uncle and his adult nephew. When the parents of aged-out derivative beneficiaries of F3 or F4 petitioners receive their visas and attain LPR status, they can file F2B petitions naming their now-adult sons and daughters as primary beneficiaries. In these F2B petitions, the identity of the petitioner changes from the beneficiary's grandparent or aunt or uncle to his or her parent.[2]

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[2] For example, U.S. citizen Adele files an F3 petition on behalf of her adult son Aron, and includes Aron's daughter Naira as a derivative beneficiary. By the time Aron receives a visa, Naira is over

The plain language of a statute controls except when "its application leads to unreasonable or impracticable results." *Valladolid v. Pac. Operations Offshore, LLP,* 604 F.3d 1126, 1133 (9th Cir. 2010) (internal quotation marks omitted). The language of the CSPA contains no indication that Congress intended the identity of the petitioner to be relevant. We do not find the fact that an automatically-converted visa petition may entail a new petitioner to be the kind of "rare and exceptional circumstance[]" that renders the plain meaning of a statute impracticable. *Demarest v. Manspeaker*, 498 U.S. 184, 190, 111 S. Ct. 599, 112 L. Ed. 2d 608 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."). Plainly, a change in policy announced by the statute's plain language cannot be impracticable just because it is a change or because it does not specify how exactly that change is to be implemented. *Id.* A statute that

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twenty-one. Adele can no longer petition on Naira's behalf, as there is no qualifying relationship between a grandmother and her adult granddaughter. Once Aron becomes an LPR, Aron may file an F2B petition for his daughter Naira.

Similarly, U.S. citizen Adele files an F4 petition for her sister Kristen, and includes Kristen's daughter Sandy as a derivative beneficiary. If Sandy is over twenty-one when Kristen receives her visa, Adele cannot petition for Sandy, because Adele cannot petition for her adult niece. Kristen may file an F2B petition for her daughter Sandy.

The question here is whether the original F3 or F4 petition should be automatically converted to an F2B petition, and if the F2B petition retains the priority date of the F3 or F4 petition.

requires an agency to change its existing practices does not necessarily "lead to absurd or impracticable consequences." *Seattle-First Nat'l Bank v. Conaway,* 98 F.3d 1195, 1197 (9th Cir. 1996) (internal quotation marks omitted). We have no doubt that USCIS can develop a process for the F3 and F4 petitions of aged-out derivative beneficiaries to be automatically converted to F2B petitions, with new petitioners and new beneficiaries. The plain meaning of the CSPA controls.

In fact, the CSPA drafters seem to have contemplated that automatic conversion could require more than just a change in visa category. Subsection (h)(3) states that an alien's petition is automatically converted and retains the date of the "original petition." 8 U.S.C. § 1153(h)(3). This reference to an "original petition" suggests the possibility of a new petition, obtained either by editing the original petition or "automatically" requesting a new petition that identifies a new petitioner and primary beneficiary.[3]

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[3] The "original petition" clause also contradicts the dissent's assertion that § 1153(h)(3) is ambiguous because an F2B petition for an aged-out F3 or F4 derivative beneficiary could entail a new petition and petitioner. Dissent at 1017-19. The CSPA provides that a petition is to be automatically converted and is to "retain the original priority date issued upon receipt of the original petition." 8 U.S.C. § 1153(h)(3). Therefore, notwithstanding the use of the word "conversion" in other parts of the INA, the CSPA expressly recognizes the possibility of automatic conversion of a subsequent petition. A new petition is not a "problem" in the plain meaning of the statute that renders the language ambiguous. *See* Dissent at 1019.

Any alleged impracticability is further undermined by the reality that when an F2A petition is converted to an F2B petition for an aged-out beneficiary—the kind of change to which all parties agree subsection (h)(3) applies—USCIS must take some action to effectuate the change. And where a derivative beneficiary of an F2A petition ages out and requires a new F2B petition naming him as the primary beneficiary, the agency must change both the visa category and the identity of the primary beneficiary. These changes, which USCIS is apparently capable of handling, do not seem significantly less onerous or complicated than a visa conversion which entails a new petitioner.

We are also not convinced that any delay between the date a visa becomes available to the parent of an aged-out derivative beneficiary and the time when the parent obtains LPR status and can file an F2B petition renders automatic conversion impracticable. Until the parent of the aged-out son or daughter becomes an LPR, there is no category to which a petition for the son or daughter can immediately convert.[4] It is also true that if the parent's visa is ultimately denied, there will be no category to which his aged-out son or daughter can convert. The lag time while a parent receives his visa and adjusts status, or the possibility

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[4] For a derivative beneficiary, the benefits of § 1153(h) are triggered on "the date on which an immigrant visa number became available for the alien's parent." 8 U.S.C. § 1153(h)(1)(A). Some time will elapse between the date a visa is available to the parent and the date the visa is approved (entitling the parent may file an F2B petition for the adult son or daughter).

that conversion for an aged-out derivative is never possible, present administrative complexities that may inform USCIS's implementation of the CSPA. But these unresolved procedural questions do not create ambiguity in the text or result in a visa system "'so bizarre that Congress could not have intended' it." *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 347, 114 S. Ct. 843, 127 L. Ed. 2d 165 (1994) (quoting *Demarest*, 498 U.S. at 191, 111 S. Ct. 599). Therefore, the plain language of the CSPA is not impracticable. It is the agency's task to resolve these complications, not the court's.

Moreover, the Government's restrictive interpretation of subsection (h)(3) barely modifies the regulatory regime that existed at the time the CSPA was enacted. According to the Government, the CSPA makes priority date retention and automatic conversion available only to primary and derivative beneficiaries of F2A petitions. However, under 8 C.F.R. § 204.2(a)(4), which pre-dated the CSPA, an LPR is entitled to file an F2B petition on behalf of an aged-out son or daughter and retain the original priority date from the LPR's original F2A petition. For such aliens, the only benefit of the CSPA over the current regulatory rule under the Government's reading is automatic conversion, as the regulation requires that the LPR parent file a new F2B petition on behalf of his or her son or daughter to qualify for priority date retention. Thus, under the Government's interpretation, subsection (h)(3)'s only effects are to extend automatic conversion and priority date retention to aged-out primary beneficiaries of F2A visa petitions, and automatic conversion to F2A derivative beneficiaries. Like the Fifth Circuit, "[w]e are skeptical that this meager

benefit was all Congress meant to accomplish through subsection (h)(3), especially where nothing in the statute singles out derivative beneficiaries of second-preference petitions for special treatment." *Khalid*, 655 F.3d at 374.

Additionally, 8 C.F.R. § 204.2(a)(4) explicitly requires that to qualify for priority date retention, the identity of the petitioner must remain the same, while the CSPA contains no such requirement. If Congress intended to limit automatic conversion to only subsequent petitions in which the petitioner remains the same, the regulations provided a clear example of the language it could have used. Congress's decision not to track the regulatory language further suggests that the CSPA is not merely a codification of regulatory practice. *See id.* at 374 n.9 (citing 8 C.F.R. § 204.2(a)(4)).

The parties and amici disagree about how our interpretation will affect different categories of visa petitioners and about which aliens most deserve the next available visas. The number of visas available is statutorily fixed and is far exceeded by demand. Accordingly, Congress's decision to allow aged-out beneficiaries to retain their priority dates when they join new preference category lines will necessarily impact the wait time for other aliens in the same line. It is difficult to assess the equities of this result, but that is not our role. We "are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, — U.S. —, 132 S. Ct. 2566, 2579, 183 L. Ed. 2d 450 (2012).

The CSPA, "as a whole, clearly expresses Congress' intention," and we therefore do not defer to the BIA's interpretation of subsection (h)(3). *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 42, 110 S. Ct. 929, 108 L. Ed. 2d 23 (1990); *see also Khalid*, 655 F.3d at 371 (the CSPA "as a whole, clearly expresses Congress' intention about the universe of petitions covered by (h)(3)," and "there is no room for the agency to impose its own answer to the question" (internal quotation marks omitted)). Automatic conversion and priority date retention are available to all visa petitions identified in subsection (h)(2). Because "the intent of Congress is clear, that is the end of the matter," *Chevron*, 467 U.S. at 842, 104 S. Ct. 2778, and we do not consider past agency practice or legislative history. We join the Fifth Circuit in "giv[ing] effect to the unambiguously expressed intent of Congress." *Id.* at 843, 104 S. Ct. 2778.

The district court's grants of summary judgment are reversed and these cases are remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

M. SMITH, Circuit Judge, with whom KOZINSKI, Chief Judge, and MCKEOWN, W. FLETCHER and RAWLINSON, Circuit Judges, join, dissenting:

The statutory provision at issue in this case, 8 U.S.C. § 1153(h), "is far from a model of clarity." *Robles-Tenorio v. Holder*, 444 Fed. Appx. 646, 649 (4th Cir. 2011). The Second Circuit recently held that § 1153(h)(3) means the exact opposite of what the majority holds. *See Li v. Renaud*, 654 F.3d 376, 382-83 (2d Cir. 2011). Other courts, including the

original three-judge panel in this case, concluded that § 1153(h)(3) is ambiguous, and that the Board of Immigration Appeals's (BIA) decision is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *See, e.g., Cuellar de Osorio v. Mayorkas,* 656 F.3d 954, 965-66 (9th Cir. 2011), *vacated,* 677 F.3d 921 (9th Cir. 2012); *Zhong v. Novak,* No. 08-4597, 2010 WL 3302962, at *7-9 (D.N.J. Aug. 18, 2010); *Co v. U.S. Citizenship & Immigration Serv.,* No. CV 09-776-MO, 2010 WL 1742538, at *4 (D. Or. Apr. 23, 2010); *cf. Robles-Tenorio,* 444 Fed. Appx. at 649 ("It is unclear whether the text and structure of (h)(1) and (h)(3) can be reconciled in any coherent or reasonable fashion."). If the meaning of § 1153(h)(3) were truly as clear and unmistakable as the majority holds, it certainly has eluded more than its share of reasonable jurists.[1]

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[1] I do not state or imply that a circuit split is evidence that a statute is ambiguous, although the Supreme Court has stated that "contrasting positions of the respective parties and their *amici*" may demonstrate that a statute "do[es] embrace some ambiguities." *Dewsnup v. Timm,* 502 U.S. 410, 416, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992); *see also Smiley v. Citibank (S.D.), N.A.,* 517 U.S. 735, 739, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996) ("In light of the two dissents from the opinion of the Supreme Court of California, and in light of the opinion of the Supreme Court of New Jersey creating the conflict that has prompted us to take this case, it would be difficult indeed to contend that the word 'interest' in the National Bank Act is unambiguous with regard to the point at issue here.") (internal citations omitted).

Of course, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context

I would hold that 8 U.S.C. § 1153(h)(3) is ambiguous because it contains language simultaneously including and excluding derivative beneficiaries of F3 and F4 visa petitions from the benefits of the Child Status Protection Act (the CSPA), 8 U.S.C. § 1153(h). Because Congress did not "speak[ ] with the precision necessary to say definitively whether [the statute] applies to" F3 and F4 derivative beneficiaries, I would proceed to *Chevron* step two. *Mayo Found. for Med. Educ. & Research v. United States,* — U.S. —, 131 S. Ct. 704, 711, 178 L. Ed. 2d 588 (2011) (first alteration added, second alteration in original, and citation omitted). At step two, I would defer to the BIA's interpretation of § 1153(h)(3) in *Matter of Wang,* 25 I. & N. Dec. 28 (2009). Because the majority holds otherwise, I respectfully dissent.

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in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). I merely point out the common sense proposition that if the intent of Congress were truly clear, it would be surprising that so many courts misread the statute. Nevertheless, it is worth noting that there is currently a circuit split over whether the existence of a circuit split is evidence of statutory ambiguity. *Compare Snell Island SNF LLC v. NLRB,* 568 F.3d 410, 419-20 (2d Cir. 2009) (evidence), *vacated on other grounds,* — U.S. —, 130 S. Ct. 3498, 177 L. Ed. 2d 1085 (2010), *McCreary v. Offner,* 172 F.3d 76, 82-83 (D.C. Cir. 1999) (same), *and In re S. Star Foods, Inc.,* 144 F.3d 712, 715 (10th Cir. 1998) (same), *with Allapattah Servs., Inc. v. Exxon Corp.,* 333 F.3d 1248, 1254 n.4 (11th Cir. 2003) (not evidence), *aff'd,* 545 U.S. 546, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005), *and Rosmer v. Pfizer Inc.,* 263 F.3d 110, 118 (4th Cir. 2001) (same).

I. *Chevron* Step One

At *Chevron* step one, "we ask whether the statute's plain terms 'directly addres[s] the precise question at issue.'" *Nat'l Cable & TelecommS. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 986, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005) (quoting *Chevron,* 467 U.S. at 843, 104 S. Ct. 2778) (alteration in original). "If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.'" *Id.* (quoting *Chevron,* 467 U.S. at 845, 104 S. Ct. 2778). Thus, the relevant question at the first step of *Chevron* is whether "the intent of Congress is clear." *Chevron,* 467 U.S. at 842, 104 S. Ct. 2778. Unless the statute's plain text "speak[s] with the precision necessary to say definitively whether [the statute] applies to" a particular class of individuals, the statute is ambiguous. *Mayo Found.,* 131 S. Ct. at 711 (alteration in original). Typically, such an ambiguity "lead[s] . . . inexorably to *Chevron* step two." *Id.*

Section 1153(h)(3) states: "If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. § 1153(h)(3). The crux of the appeal is whether F3 and F4 derivative beneficiaries are entitled to the benefits provided in this provision.

Many reasonable constructions of § 1153(h)(3) are possible. One could reasonably read § 1153(h)(3), as the majority does, to include F3 and F4 derivative

beneficiaries because this provision references the age-calculation formula in § 1153(h)(1), which covers derivative beneficiaries of F3 and F4 petitions through § 1153(h)(2). But three limitations in § 1153(h)(3) complicate matters: (1) that a petition must be converted "to the appropriate category;" (2) that only "the alien's petition" may be converted; and (3) that the conversion process has to occur "automatically." *See* 8 U.S.C. § 1153(h)(3). By ignoring statutory language contrary to its interpretation before finding the plain meaning clear, the majority not only misconstrues its role at *Chevron* step one, but it also runs afoul of Supreme Court precedent controlling how courts are supposed to interpret statutes. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 666, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007) ("In making the threshold determination under *Chevron,* 'a reviewing court should not confine itself to examining a particular statutory provision in isolation.'") (citation omitted); *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (citation omitted).

One could reasonably construe § 1153(h)(3) as excluding aged-out F3 and F4 derivative beneficiaries. This provision requires conversion "to the appropriate category." 8 U.S.C. § 1153(h)(3). Section 1153(a) identifies the only categories for which a family-preference petition may be filed: (1) "[u]nmarried sons and daughters of citizens;" (2) "[s]pouses and unmarried sons and unmarried daughters of permanent resident aliens;" (3) "[m]arried sons and married daugh-

ters of citizens;" and (4) "[b]rothers and sisters of citizens." *Id.* § 1153(a)(1)-(4). The children eligible to enter as derivative beneficiaries of their parents' visa petitions are the grandchildren, nieces, and nephews of United States citizens. When those children turn 21 and are no longer eligible to enter with their parents, there is no section 1153(a) category into which they fit on their own. This led the Second Circuit to conclude that Congress did not intend to provide them the benefits of automatic conversion and retention of their original priority dates: "Because there is no family preference category for grandchildren of [lawful permanent residents], and Cen has not specified a category that would be appropriate, Cen cannot be converted to an 'appropriate category' *with respect to his grandfather's petition*. Therefore, Cen is not eligible under Section 1153(h)(3) to retain the 1994 priority date of his grandfather's petition." *Li,* 654 F.3d at 385 (emphasis added). We should do the same.

Second, § 1153(h)(3) requires "the alien's petition" to be automatically converted. 8 U.S.C. § 1153(h)(3). As the majority concedes, conversion of F3 and F4 derivative beneficiaries to the F2B category requires "a subsequent petition" and "a new petitioner" because "the identity of the petitioner changes from the beneficiary's grandparent or aunt or uncle to his parent." *See id.* § 1153(a)(2)(B). But "a subsequent petition" is not the alien's original petition. Because the alien's original petition cannot be converted, as § 1153(h)(3) requires, and, instead, an entirely new petition must be

filed, one could also reasonably conclude that Congress did not intend to cover F3 and F4 derivative beneficiaries in § 1153(h)(3).[2] *See Li,* 654 F.3d at 384 (implying that § 1153(h)(3) does not apply where "a different family-sponsored petition by a different petitioner" is required).

Third, § 1153(h)(3) mandates that the conversion process occur "automatically." 8 U.S.C. § 1153(h)(3). The majority correctly recognizes that "[w]hen the parents of aged-out derivative beneficiaries of F3 or F4 petitioners receive their visas and attain [lawful permanent resident] status, they can file F2B petitions naming their now-adult sons and daughters as primary beneficiaries." *See id.* § 1153(a)(2)(B). An action cannot be "automatic" if it depends on what a person *can* or *may* do, not what he or she definitely *will* do. A process is "automatic" if it is "self-acting or self-regulating," or occurs "without thought or conscious intention." *Webster's Third New International Dictionary* 148 (2002). As the original panel in this case concluded, "The phrase 'the alien's petition shall automatically be converted to the appropriate category,' 8 U.S.C. § 1153(h)(3), suggests that the *same* petition, filed by the *same* petitioner for the *same* beneficiary,

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[2] Contrary to the majority opinion, the statute does not "expressly recognize[] the possibility of automatic conversion of a subsequent petition." As the Second Circuit noted, "[e]ach time the Act uses the word 'conversion' it describes a change—*without need for an additional petition*—from one classification to another, not from one person's family-sponsored petition to another." *Li,* 654 F.3d at 384 (emphasis added).

converts to a new category. This understanding comports with the ordinary meaning of the word 'automatic,' which implies that the conversion should happen without any outside input, such as a new petitioner." *Cuellar de Osorio v. Mayorkas,* 656 F.3d 954, 962 (9th Cir. 2011), *withdrawn by* 677 F.3d 921, 921-22 (9th Cir. 2012).

The majority's reading of § 1153(h)(3) thus strains the ordinary meaning of the word "automatically," essentially reading this limitation on which petitions may be converted out of the statute. This is not a sound approach to statutory interpretation. *See Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167, 175, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (citation omitted); *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States,* 340 U.S. 593, 596, 71 S. Ct. 515, 95 L. Ed. 566 (1951) ("Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort.").

The majority recognizes the problem that an F2B petition requires an entirely new petition and petitioner, but it only considers this issue in the course of determining whether the statutory scheme set up by Congress is impracticable. In my view, the need to file a new petition does not go to whether the statutory scheme is impracticable and thus should be excepted from the plain meaning rule. It goes to whether the plain meaning of § 1153(h)(3) is ambiguous. The majority disregards the lack of any appropriate cate-

gory to which derivative beneficiaries of F3 and F4 petitions can be converted before finding the plain language clear. In doing so, the majority overlooks highly relevant evidence from the overall statutory scheme that Congress did not intend for these individuals to receive the benefits identified in § 1153(h)(3). *See Brown & Williamson,* 529 U.S. at 132-33, 120 S. Ct. 1291 (stating that "a reviewing court should not confine itself to examining a particular statutory provision in isolation" and should consider how statutory language fits into "the overall statutory scheme") (citation omitted). It forgets that "[i]n ascertaining the plain meaning of the statute, the court must look to . . . the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988).

Section 1153(h)(3) is also unclear about whether aged-out derivative beneficiaries are entitled to retain their original priority dates. Importantly, § 1153(h)(3) ties automatic conversion and retention of an original priority date together by specifying that an eligible alien's petition "shall automatically be converted to the appropriate category *and* the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. § 1153(h)(3) (emphasis added). "[T]he Supreme Court has said that 'and' presumptively should be read in its 'ordinary' conjunctive sense unless the 'context' in which the term is used or 'other provisions of the statute' dictate a contrary interpretation." *OfficeMax, Inc. v. United States,* 428 F.3d 583, 589 (6th Cir. 2005) (listing cases); *see also Bruesewitz v. Wyeth LLC,* — U.S. —, 131 S. Ct. 1068, 1078, 179 L. Ed. 2d 1 (2011) (noting that "linking in-

dependent ideas is the job of a coordinating junction like 'and'"). Nothing in the statute suggests that Congress meant for the word "and" to be read as "or." Since the word "and" ties the two benefits together, the ambiguity about the availability of automatic conversion to F3 and F4 derivative beneficiaries also renders the statute ambiguous as to whether such beneficiaries are entitled to retention of their original priority dates. *See Li,* 654 F.3d at 383-84 (rejecting the argument that the two benefits are distinct and independent).

Accordingly, I would hold that it is unclear whether Congress intended for aged-out F3 and F4 derivative beneficiaries to enjoy automatic conversion to a new category and retention of their priority dates. Section 1153(h)(3) appears to give contradictory answers to this question. Because this provision's plain terms do not yield a clear and consistent answer, I would proceed to *Chevron* step two.

II. *Chevron* Step Two

"The sole question for the Court at step two under the *Chevron* analysis is 'whether the agency's answer is based on a permissible construction of the statute.'" *Mayo Found.,* 131 S. Ct. at 712 (quoting *Chevron,* 467 U.S. at 843, 104 S. Ct. 2778). "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X,* 545 U.S. at 980, 125 S. Ct. 2688. The BIA's interpretations of the INA are entitled to *Chevron* deference.

See Negusie v. Holder, 555 U.S. 511, 517, 129 S. Ct. 1159, 173 L. Ed. 2d 20 (2009).

The BIA interpreted § 1153(h)(3) in *Matter of Wang,* 25 I. & N. Dec. at 33-39, holding that automatic conversion and priority date retention are not available where there is no category to which a beneficiary's petition can be converted, and a new petition would have to be filed by a new petitioner. *See id.* at 38-39; *see also id.* at 35 (explaining how "conversion" and "retention" have traditionally been interpreted). Thus, the BIA held that an aged-out derivative beneficiary of an F4 petition was not entitled to automatic conversion to a new category and retention of her original priority date when her father subsequently filed an F2 petition on her behalf. *See id.* at 38-39.

I would hold that the BIA's interpretation of § 1153(h)(3) is reasonable. As discussed above, there is no appropriate category to which derivative beneficiaries of F3 and F4 petitions may be converted if they age out because a petition may not be filed on behalf of a United States citizen's niece, nephew, or grandchild. No such family-preference categories exist. As the BIA recognized, there is "no clear indication in the statute that Congress intended to expand the historical categories eligible for automatic conversion and priority date retention . . . . " *Id.* at 36. The legislative history of the CSPA is also unclear about whether Congress intended for aged-out F3 and F4 derivative beneficiaries to receive the benefits of § 1153(h)(3). *See id.* at 36-38. Policy considerations also counsel deference to the BIA's interpretation of the statute. Congress caps the number of visas available to aliens in each preference category, and the

demand for such visas far outstrips the supply. *See* 8 U.S.C. § 1151(c); *Matter of Wang,* 25 I. & N. Dec. at 38. Reading section 1153(h)(3) as the majority does will not permit more aliens to enter the country or keep more families together, but will simply shuffle the order in which individual aliens get to immigrate. If F3 and F4 derivative beneficiaries can retain their parents' priority date, they will displace other aliens who themselves have endured lengthy waits for a visa. What's more, these derivative beneficiaries—who do not have one of the relationships in section 1153(a) that would independently qualify them for a visa—would bump aliens who *do* have such a qualifying relationship. As the BIA recognized, Congress could not have intended this zero-sum game. *See Matter of Wang,* 25 I. & N. Dec. at 36-38. I would defer to the agency's reasonable construction of the statute at *Chevron* step two. *See Brand X,* 545 U.S. at 980, 125 S. Ct. 2688.

III. Conclusion

I would hold that § 1153(h)(3) is ambiguous about whether aged-out F3 and F4 derivative beneficiaries are within its ambit, and that the BIA's conclusion that they are not is reasonable. I believe that the BIA's construction of this provision is entitled to deference. *See Mayo Found.,* 131 S. Ct. at 712; *Brand X,* 545 U.S. at 980, 125 S. Ct. 2688. Accordingly, I would affirm the district court.

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos.: 09-56786, 09-56846

ROSALINA CUELLAR DE OSORIO; ELIZABETH MAGPANTAY; EVELYN Y. SANTOS; MARIA ELOISA LIWAG; NORMA UY; RUTH UY, PLAINTIFFS-APPELLANTS,

v.

ALEJANDRO KAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; JANET NAPOLITANO, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, HILLARY RODHAM CLINTON, SECRETARY OF STATE, DEFENDANTS-APPELLEES

TERESITA G. COSTELO; LORENZO P. ONG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS

v.

JANET NAPOLITANO, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; LYNNE SKEIRIK, DIRECTOR, NATIONAL VISA CENTER; CHRISTINA POULOS, ACTING DIRECTOR, CALIFORNIA SERVICE CENTER, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; HILLARY RODHAM CLINTON, SECRETARY OF STATE, DEFENDANTS-APPELLEES

Filed: Sept. 2, 2011
Argued and Submitted: July 15, 2011

Appeal from the United States District Court for the Central District of California, James V. Selna, District Judge, Presiding.
D.C. Nos. 5:08-cv-00840-JVS-SH, 8:08-cv-00688-JVS-SH.

OPINION

Before: PAMELA ANN RYMER, RICHARD C. TALLMAN, AND SANDRA S. IKUTA, Circuit Judges

TALLMAN, Circuit Judge:

This case involves parents who face separation from their children due to the way our immigration system operates. Appellants, the parents, have all immigrated to the United States and become lawful permanent residents. Their children, however, have not been able to join them because the children are no longer under the age of 21.

Appellants became lawful permanent residents through the family-sponsored immigration process, which allows certain aliens to immigrate based on their status as relatives of either U.S. citizens or lawful permanent residents. When Appellants began this process, they all had children under the age of 21 who would have been eligible to immigrate with them under the Immigration and Nationality Act (INA). *See* 8 U.S.C. §§ 1101(b)(1), 1153(d) (entitling a child under the age of 21 to the same immigration status as a parent). However, due to years-long delays associated

with the family-sponsored immigration process, these children turned 21 before their parents were able to immigrate or adjust status. Because these children had "aged out" of child status under the INA by the time their parents immigrated or adjusted status, they were no longer eligible to accompany their parents.

The question we are faced with today is whether Appellants' children are entitled to any relief under the Child Status Protection Act (CSPA), 8 U.S.C. § 1153(h), which was enacted to help keep families together by expediting the immigration process for certain aged-out aliens. United States Citizenship and Immigration Services (CIS) denied Appellants' requests for relief under the CSPA, and Appellants challenge the denial as arbitrary and capricious. The district court, deferring to the Board of Immigration Appeals' (BIA) interpretation of § 1153(h), held that the CSPA did not apply to Appellants' children. Because we agree that the BIA's interpretation of § 1153(h) warrants deference, we affirm the district court's grant of summary judgment in favor of CIS. We hold that Appellants' children are not among the aged-out aliens entitled to relief under § 1153(h).

I

Understanding this appeal requires familiarity with the family-sponsored immigration process and, specifically, the complicated family preference system. Family-sponsored immigration is one of the primary avenues by which an alien can obtain lawful permanent residence in the United States, along with employment-based immigration, diversity-based immigration, and asylum. The family-sponsored immigration process allows a U.S. citizen or lawful permanent resident

(LPR) to file a form I-130 immigration petition on behalf of an alien relative. 8 U.S.C. § 1153(a). After the petition is filed, CIS determines if it establishes a qualifying relationship between the citizen or LPR petitioner and the alien relative beneficiary. Because there is no annual cap on the number of permanent resident visas (also known as "green cards") available to immediate relatives of U.S. citizens, a citizen's spouse, child under the age of 21, or parent can apply for one immediately.

For other qualifying relatives of citizens and for qualifying relatives of LPRs, the number of visas available annually is capped. *Id.* § 1151(c). To allocate these visas, the INA establishes the following preference system:

> Aliens subject to the worldwide [numerical limitation] for family-sponsored immigrants shall be allotted visas as follows:
>
> (1) Unmarried sons and daughters [age 21 or older] of citizens
>
> Qualified immigrants who are the unmarried sons or daughters of citizens of the United States shall be allocated visas in a number not to exceed [numerical quota formula].
>
> (2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens
>
> Qualified immigrants—
>
> (A) who are the spouses or children [under 21] of an alien lawfully admitted for permanent residence, or

> (B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence,
>
> shall be allocated visas in a number not to exceed [numerical quota formula].
>
> (3) Married sons and married daughters of citizens
>
> Qualified immigrants who are the married sons or married daughters of citizens of the United States shall be allocated visas in a number not to exceed [numerical quota formula].
>
> (4) Brothers and sisters of citizens
>
> Qualified immigrants who are the brothers or sisters of citizens of the United States, if such citizens are at least 21 years of age, shall be allocated visas in a number not to exceed [numerical quota formula].

Id. § 1153(a). If an I-130 petition establishes one of these qualifying relationships, CIS approves it and places the alien beneficiary "in line" in the appropriate preference category. These family preference categories are referred to as F1, F2A, F2B, F3, or F4, corresponding to § 1153(a)'s numbered paragraphs.

Because annual demand for family preference visas exceeds the statutory cap in all categories, a beneficiary may wait years before a visa becomes available, with some categories having longer wait times than others. The beneficiary's place in line is determined by the date the petition was filed, which is known as the "priority date." Every month, the State Department publishes a visa bulletin with updated "cut off dates" for each family preference category. When

the cut-off date is later than the beneficiary's priority date, the priority date is "current," and a lawful permanent resident visa is then available for the beneficiary. In order to obtain the visa and become an LPR, however, the beneficiary must act within one year of notification of visa availability to complete consular processing (if abroad) or apply for an adjustment of status (if present in the United States).

Under the INA, a beneficiary's spouse or child is deemed a "derivative" beneficiary entitled to the same immigration status and priority date as the primary beneficiary:

> A spouse or child . . . shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a) . . . of this section, be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

8 U.S.C. § 1153(d). Importantly, to be considered a "child," a person must be unmarried and under the age of 21. *Id.* § 1101(b)(1). Due to the long wait times often associated with family preference visas, some aliens who begin the process eligible to immigrate as a child—either as the primary beneficiary of an F2A petition or as a derivative beneficiary of a petition for a parent in any of the other family preference categories—will "age out" of eligibility by turning 21 before a visa becomes available.

In 2002, Congress enacted the CSPA to provide relief to "aged out" alien children by allowing them either to maintain "child" status longer, *see* 8 U.S.C. § 1153(h)(1), or to automatically convert to a valid

adult visa category while retaining the priority date associated with their original petition, *see id.* § 1153(h)(3). The issue before us is whether an aged-out derivative beneficiary of an F3 petition (for married sons or daughters of U.S. citizens) or F4 petition (for siblings of U.S. citizens)—i.e., a grandchild or niece or nephew of a U.S. citizen—is entitled to automatic conversion and priority date retention, or either of them separately, under the CSPA.

II

Two cases, each with multiple plaintiffs, were consolidated before us in this appeal. The facts of these cases illustrate the family-sponsored immigration process and the age-out problem.

A

In one case, Rosalina Cuellar de Osorio was the beneficiary of an F3 petition filed by her U.S. citizen mother on May 5, 1998. Cuellar de Osorio's son, who was born in July 1984, was thirteen at the time and a derivative beneficiary of the F3 petition. By the time Cuellar de Osorio's priority date became current on November 1, 2005, her son had turned 21 and aged out of derivative status. Therefore, he was no longer eligible to immigrate with his mother. After Cuellar de Osorio became an LPR in August 2006, she filed an F2B petition (for adult sons or daughters of LPRs) on behalf of her son. Invoking the CSPA, she requested retention of the original F3 petition's May 5, 1998, priority date for the F2B petition, which would enable her son to immigrate much sooner than if he was assigned a more recent priority date based on the F2B filing date.

On June 23, 2008, Cuellar de Osorio filed a lawsuit against CIS in the Central District Court of California along with several other similarly situated plaintiffs who had asked CIS for (and not obtained) priority date retention for their aged-out children.[1] They sought declaratory and mandamus relief, alleging that CIS arbitrarily and capriciously failed to grant the requested priority dates in violation of the CSPA provisions codified at 8 U.S.C. § 1153(h)(3).

The district court held the case in abeyance pending a precedential BIA decision interpreting § 1153(h) in *Matter of Wang.* On June 16, 2009, the BIA issued its decision, which held that the automatic conversion and priority date retention provisions of the CSPA did not apply to derivative beneficiaries of F4 petitions. *See* 25 I. & N. Dec. 28 (B.I.A. 2009). The district court then granted summary judgment to CIS on October 9, 2009, holding that the BIA's interpretation of § 1153(h) in *Matter of Wang,* according to which the

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[1] Sisters Elizabeth Magpantay, Evelyn Y. Santos, and Maria Eloisa Liwag were each the beneficiary of an F3 petition filed by their U.S. citizen father on January 29, 1991. Each also has children who aged out of derivative status before the F3 petition's priority date became current on December 15, 2005. The sisters seek to retain the F3 petition's 1991 priority date on new F2B petitions they have filed for their now-adult sons and daughters.

Norma Uy was the beneficiary of an F4 petition filed by her U.S. citizen sister on February 4, 1981. She has a daughter, Ruth, who aged out of derivative status before the F4 petition's priority date became current in July 2002. Norma and Ruth seek to retain the F4 petition's 1981 priority date on a new F2B petition Norma has filed on behalf of Ruth.

Plaintiffs were not entitled to relief, should receive *Chevron* deference. Plaintiffs timely appealed.

B

Meanwhile, on June 20, 2008, Teresita G. Costelo and Lorenzo Ong had separately filed a class-action lawsuit in district court. Costelo was the beneficiary of an F3 petition filed by her U.S. citizen mother on January 5, 1990. At the time, she had two daughters, aged 10 and 13, who were derivative beneficiaries of the petition. By the time Costelo's priority date became current fourteen years later in 2004, both daughters had aged out of derivative status. After Costelo became an LPR, she filed F2B petitions for her adult daughters and requested retention of the January 5, 1990, priority date for the F2B petitions.

Ong was the beneficiary of an F4 petition filed by his U.S. citizen sister in 1981. At that time, he had two daughters, aged 2 and 4. By the time Ong's priority date became current twenty-one years later in 2002, his daughters had aged out of derivative status. In March 2005, after Ong obtained LPR status, he filed F2B petitions on behalf of his now-adult daughters and requested retention of the 1981 priority date for these petitions.

On July 16, 2009, the district court certified a class in *Costelo v. Chertoff,* 258 F.R.D. 600 (C.D. Cal. 2009) consisting of:

> Aliens who became lawful permanent residents as primary beneficiaries of [F3 and F4] visa petitions listing their children as derivative beneficiaries, and who subsequently filed [F2B] petitions on behalf of their aged-out unmarried sons and daughters, for

whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § [1153](h)(3).

After the parties cross-moved for summary judgment, the district court granted summary judgment to the government on November 12, 2009, again deferring to *Matter of Wang.* Plaintiffs timely appealed. The appeals in *De Osorio* and *Costelo* have been consolidated before us.

III

We review de novo a district court's grant of summary judgment. *Family Inc. v. U.S. Citizenship & Immigration Servs.,* 469 F.3d 1313, 1315 (9th Cir. 2006). The interpretation of a statute is a question of law, *United States v. Cabaccang,* 332 F.3d 622, 624-25 (9th Cir. 2003) (en banc), and "we review *de novo* the BIA's determination of questions of law, except to the extent that deference is owed to its interpretation of the governing statutes and regulations." *Garcia-Quintero v. Gonzales,* 455 F.3d 1006, 1011 (9th Cir. 2006). We review a precedential decision of the BIA interpreting a governing statute according to the principles of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *INS v. Aguirre-Aguirre,* 526 U.S. 415, 425, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999).

Under the familiar two-step *Chevron* framework, we first ask "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842, 104 S. Ct. 2778. If it has, we "must give effect to the unambiguously expressed intent of Congress," regardless of the agency's interpretation. *Id.* at 842-43, 104 S. Ct.

2778. If, on the other hand, the statute is "silent or ambiguous" with regard to the issue, we proceed to step two and determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. 2778 (footnote omitted). We must defer to the agency's interpretation if it is reasonable. *Id.* at 844, 104 S. Ct. 2778 (holding that when Congress has left a gap for an agency to fill, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator or agency.").

IV

We now turn to the statutory provision at issue. In order to address the age-out problem, Congress passed the CSPA in 2002. *See* Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002). The CSPA, in relevant part, amended the INA to provide as follows:

> (h) Rules for determining whether certain aliens are children
>
> (1) In general
>
> For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement ... of this title shall be made using—
>
> (A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for perma-

> nent residence within one year of such availability; reduced by
>
> (B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.
>
> (2) Petitions described
>
> The petition described in this paragraph is—
>
> (A) with respect to a relationship described in subsection (a)(2)(A) of this section, a petition filed . . . for classification of an alien child under subsection (a)(2)(A) of this section; or
>
> (B) with respect to an alien child who is a derivative beneficiary under subsection (d) of this section, a petition filed ... for classification of the alien's parent under subsection (a), (b), or (c) of this section.
>
> (3) Retention of priority date
>
> If the age of an alien is determined under paragraph (a) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

8 U.S.C. § 1153.

The parties do not dispute the meaning of paragraphs (1) and (2) above. Paragraph (1) provides that, if an alien applies for a visa within a year of one becoming available (i.e., within one year of the priority date on a relevant petition becoming current), the alien's age for purposes of determining whether she is

a "child" is determined by her age on the date the visa became available minus the number of days that the petition was "pending"—that is, the number of days between the *filing* of the petition with CIS and its *approval* by CIS. *See Ochoa-Amaya v. Gonzales*, 479 F.3d 989, 993 (9th Cir. 2007). In this way, paragraph (1) ensures that an alien does not lose "child" status solely because of administrative delays in the processing of an otherwise valid petition. However, it does not address the much longer oversubscription delays that are typical between the *approval* of a petition and the *availability* of a visa.[2]

Paragraph (2), which is referenced at paragraph (1)(B), simply defines the universe of petitions to which the age-reduction formula in paragraph (1) applies. Paragraph (2)(A) refers to F2A petitions for children of LPRs. *See* 8 U.S.C. § 1153(a)(2)(A). Paragraph (2)(B) refers to any family preference petition for

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[2] For example, imagine that a U.S. citizen filed a petition for an alien relative on September 1, 2002, that was approved by CIS on September 15, 2002, and the beneficiary's priority date became current on September 15, 2010. The age of a beneficiary or derivative beneficiary for purposes of determining whether she was still a "child" would be determined by subtracting 15 days from her age on September 15, 2010. No adjustment to her age would be made to compensate for the eight years between September 15, 2002, and September 15, 2010. *See Ochoa-Amaya*, 479 F.3d at 993 (rejecting argument that a petition is "pending" for purposes of § 1153(h)(1)(B) from the date it is filed until the date a visa becomes available).

which a child is a derivative beneficiary.[3] *See id.* § 1153(d).

At issue is the meaning of paragraph (3), which provides relief to aliens who are 21 or over even after the age-reduction formula in paragraph (1) is applied. In such a case, "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." *Id.* § 1153(h)(3). Importantly, this is different from the relief offered by paragraph (1). Paragraph (1) allows an aged-out alien to remain eligible for a visa as a "child" under the original petition. Paragraph (3), in contrast, does not allow the aged-out alien to retain child status. Instead, it allows him to move into a different category as an *adult* without having to file a new petition and get a new priority date. The aged-out alien may still wait in line in the new category, but because he is able to retain an older priority date, his wait time is reduced. The parties dispute whether aged-out derivative beneficiaries of F3 and F4 petitions are entitled to this relief. To answer this question, we undertake our *Chevron* analysis.

A

Our first charge under *Chevron* is to ascertain, by "employing traditional tools of statutory construction," whether "Congress had an intention on the precise

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[3] It also refers to any employment-based or diversity-based petition for which a child is a derivative beneficiary. *See* 8 U.S.C. § 1153(b), (c). Those petitions are not relevant to this appeal.

question at issue." 467 U.S. at 843 n. 9, 104 S. Ct. 2778. We begin, as always, with an examination of the statute's plain language. *See Nw. Env. Def. Ctr. v. Brown,* 640 F.3d 1063, 1070 (9th Cir. 2011).

1

First of all, we reject any contention that the word "petition" in paragraph (3) is ambiguous because it is not defined by express reference to paragraph (2), as it is in paragraph (1). As we explain, express reference to paragraph (2) is unnecessary.

Paragraph (3)'s initial clause makes it contingent upon the operation of paragraph (1). *See* 8 U.S.C. § 1153(h)(3) ("If the age of an alien is determined under paragraph (1) to be 21 years of age or older . . ."). Thus, paragraph (3) is triggered only if one has determined by doing the age-reduction calculation in paragraph (1) that an alien is 21 or over.[4] If it is triggered, "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." *Id.* Because "the alien" is necessarily one to whom paragraph (1) was

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[4] The facts of Cuellar de Osorio's case illustrate how paragraph (1)'s calculation works with respect to paragraph (3). Cuellar de Osorio's original F3 petition was filed on May 5, 1998, and approved on June 30, 1998. Thus, it was "pending" for 56 days. Her son, who was a derivative of the F3 petition, was born on July 18, 1984. When the petition's priority date became current on November 1, 2005, he was 21 years and 106 days old. Subtracting the 56 days of "pending" time, his age is 21 years, 50 days. Therefore, he is 21 or over, and paragraph (3) is triggered.

applied, "the alien's petition" naturally refers to the "applicable petition" that was considered in paragraph (1)(B). *See id.* § 1153(h)(1)(B). After all, if the alien had a petition that was not an "applicable petition" under paragraph (1), the alien would never undergo the paragraph (1) calculation, and therefore, would never be considered at paragraph (3).

An "applicable petition" in paragraph (1) is explicitly defined by reference to paragraph (2). *See* § 1153(h)(1)(B) (referring to "the applicable petition described in paragraph (2)"). As explained previously, paragraph (2) describes F2A petitions for a child and any family preference petition for which a child is a derivative beneficiary. Therefore, paragraph (3) says that any of these petitions "shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." *Id.* § 1153(h)(3). Despite this plain language, however, we find that paragraph (3)'s meaning is ambiguous for another reason.

2

The plain language of a statute does not control if "its application leads to unreasonable or impracticable results." *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1133 (9th Cir. 2010) (internal quotation and citation omitted); *see also Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 816 (9th Cir. 2004). Despite paragraph (3)'s plain language, it does not practicably apply to certain of the petitions described in paragraph (2).

The phrase "the alien's petition shall automatically be converted to the appropriate category," 8 U.S.C. § 1153(h)(3), suggests that the *same* petition, filed by the *same* petitioner for the *same* beneficiary, converts to a new category. This understanding comports with the ordinary meaning of the word "automatic," which implies that the conversion should happen without any outside input, such as a new petitioner. It also comports with current regulatory practice allowing "automatic conversion" of a petition between certain family preference categories upon the beneficiary's change in marital status or attainment of the age of 21, or upon the petitioner's naturalization. *See* 8 C.F.R. § 204.2(i). In each of these situations, it is the qualifying relationship that changes, *not* the identity of petitioner or the beneficiary. Since there is no change in the parties to the petition, the same petition can simply be reclassified "automatically."

Not so, however, for F3 and F4 petitions when a derivative ages out. In such a case, there is no "appropriate category" for the petition to "automatically be converted to" vis-a-vis the same petitioner. For example, in the case of an F3 petition for married sons and daughters of U.S. citizens for which a child is a derivative beneficiary, the original petitioner is the child's U.S. citizen grandparent. After the derivative turns 21, there is no qualifying relationship between the petitioner and the derivative, because a U.S. citizen cannot petition on behalf of an adult grandson or granddaughter. *See* 8 U.S.C. § 1153(a). The same difficulty arises in the case of an F4 petition for a U.S. citizen's sibling for which a child is a derivative beneficiary. The original petitioner is the child's U.S. citizen aunt or uncle. After the derivative turns 21,

there is no qualifying relationship between the petitioner and the derivative, because a U.S. citizen cannot petition on behalf of a niece or nephew. *See id.*

Appellants contend that there is an "appropriate category" for an aged-out F3 or F4 derivative to convert into because, at the moment paragraph (3) operates, the derivative can establish a qualifying F2B relationship as the adult son or daughter of an LPR. Paragraph (3) operates when a visa has become available for the derivative's parent as the primary beneficiary of the F3 or F4 petition, the derivative has applied for a visa within one year, and the derivative has been determined to be 21 or older under paragraph (1).[5] *See id.* § 1153(h)(1). At that point, the derivative's parent may have obtained LPR status under the original F3 or F4 petition, in which case the aged-out derivative qualifies for the F2B category. But while F2B may well be an "appropriate category" for the aged-out derivative to convert to, this conversion cannot "automatically" take place, given that a new petitioner—the LPR parent—is required. Appellants essentially ask us to ignore the word "automatically" in paragraph (3). We decline to do so. *See Miller v. United States*, 363 F.3d 999, 1008 (9th Cir. 2004)

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[5] To the extent that the government argues that paragraph (3) operates at the moment the derivative turns 21, we disagree. Paragraph (3) cannot possibly operate at the moment the derivative turns 21, because it is not even triggered until the derivative has already been determined to be *at least* 21 even after subtracting pending petition time as required by paragraph (1). *See* 8 U.S.C. § 1153(h).

("Courts must aspire to give meaning to every word of a legislative enactment.").

In short, despite the fact that the word "petition" in paragraph (3) can be read to encompass all petitions in paragraph (2), including F3 and F4 petitions, automatic conversion does not practicably apply to F3 and F4 petitions. Therefore, we find paragraph (3)'s meaning to be unclear.

3

Appellants argue that, regardless of whether automatic conversion applies, paragraph (3) unambiguously entitles an aged-out derivative beneficiary of an F3 or F4 petition to priority date retention. We disagree because we find that Congress did not speak clearly as to whether priority date retention can be applied independently of automatic conversion.

Again turning to the text of paragraph (3), if an alien is determined to be 21 or older, "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. § 1153(h)(3). It is certainly possible to read this language, which includes two grammatically independent clauses, as conferring automatic conversion and priority date retention as independent benefits. However, it is also entirely possible to interpret it as conferring those two benefits jointly. *See Li v. Renaud,* 654 F.3d 376, 382-83 (2d Cir. 2011) ("Congress could have, but did not, provide beneficiaries the option to select *either* conversion *or* retention *or* both."). Automatic conversion and priority date retention commonly (though not always) happen together in the

family-sponsored immigration scheme. *See* 8 C.F.R. § 204.2(i) (providing priority date retention with automatic conversion). *But cf. id.* § 204.2(a)(4) (granting priority date retention without automatic conversion). Furthermore, elsewhere in the CSPA, Congress much more explicitly indicated when it intended automatic conversion and priority date retention to operate independently. *See* CSPA § 6, *codified at* 8 U.S.C. § 1154(k)(3) ("Regardless of whether a petition is converted under this subsection or not, if an [alien] described in this subsection was assigned a priority date with respect to such petition . . . he or she may maintain that priority date.").

Because paragraph (3) can be interpreted both ways, it is ambiguous. When a statutory provision is ambiguous, we may "look to its legislative history for evidence of congressional intent," *United States v. Daas,* 198 F.3d 1167, 1174 (9th Cir. 1999), but in this case the legislative history is inconclusive. There is no specific discussion of particular age-out protections for derivative beneficiaries of family preference petitions. *See, e.g.,* H.R. Rep. No. 107-807, at 49-50 (2003). Because we find no clearly expressed congressional intent on the precise question whether derivative beneficiaries of F3 and F4 petitions are entitled to automatic conversion or priority date retention, we must proceed to step two of the *Chevron* analysis.

B

At step two of *Chevron* we ask whether the administering agency's interpretation of the statutory provision at issue is "permissible." *See* 467 U.S. at 843, 104 S. Ct. 2778. The step two test "is satisfied if the

agency's interpretation reflects a plausible construction of the statute's plain language and does not otherwise conflict with Congress' expressed intent." *Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1116 (9th Cir. 2006) (internal quotation omitted). "We will not overturn an agency decision at the second step unless it is arbitrary, capricious, or manifestly contrary to the statute." *Ramos-Lopez v. Holder*, 563 F.3d 855, 859 (9th Cir. 2009) (internal quotation omitted).

The relevant agency interpretation of § 1153(h)(3) was articulated by the BIA in *Matter of Wang*, 25 I. & N. Dec. 28. In *Matter of Wang*, the BIA found that, under the existing regulatory scheme, "automatic conversion" happens only when "neither the beneficiary nor an immigration officer need take any action to effect the conversion to the new preference category." *Id.* at 35. Thus, the BIA concluded that a petition could only "automatically be converted" under § 1153(h)(3) when it could transfer from one visa category to another such that "the beneficiary of that petition then falls within a new classification without the need to file a new visa petition." *Id.* The BIA also concluded that priority date retention could *not* operate separately from automatic conversion, rejecting the contention that "all children who were derivative beneficiaries would gain favorable priority date status, even with regard to a new visa petition that is wholly independent of the original petition and that may be filed without any time limitation in the future." *Id.* at 36; *see also id.* at 39 (finding no clear legislative intent "to create an open-ended grandfathering of priority dates that allow[s] derivative beneficiaries to retain an earlier priority date set in the context of a different relationship, to be used at any time").

The effect of *Matter of Wang* is to limit § 1153(h)(3)'s applicability to only one petition type: F2A. This is the only petition with an "appropriate category" to which an aged-out primary or derivative beneficiary may "automatically be converted" without a change in petitioner. For example, an aged-out primary beneficiary of an F2A petition filed by his LPR parent can become the beneficiary of an F2B petition filed by that same parent. The same is true for an aged-out derivative beneficiary of an F2A petition filed by his LPR parent for a spouse.[6] But an aged-out derivative beneficiary of any other family preference petition category, such as F3 or F4, cannot qualify for a new category without a new petitioner

We find the BIA's interpretation of § 1153(h)(3) to be a "permissible" one. *See Chevron,* 467 U.S. at 843, 104 S. Ct. 2778. It "reflects a plausible construction of the statute's plain language," *Or. Trollers Ass'n,* 452 F.3d at 1116 (internal quotation omitted), because it accords with the ordinary usage of the word "automatic" to describe something that occurs without requiring additional input, such as a different petitioner. We also note that, contrary to Appellants' assertion, the BIA's construction does not render § 1153(h)(3)'s reference to § 1153(d) meaningless. *See* 8 U.S.C. § 1153(h)(3) (referring to "subsections (a)(2)(A) *and (d)*" (emphasis added)). The reference to subsection

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[6] Note that a child can be either a primary or a derivative beneficiary of an F2A petition. Many families choose to save filing fees by including a child as a derivative on an F2A petition for a spouse rather than as a primary beneficiary on a separate F2A petition.

(d), which entitles an alien beneficiary's child to the same status as the parent, has a clear function under the BIA's interpretation because it covers aged-out *derivative beneficiaries* of F2A petitions. Without this reference, only aged-out *primary* beneficiaries of F2A petitions would be entitled to relief, because subsection (a)(2)(A) refers only to the spouses or children of LPRS, not the children of alien beneficiaries.

Appellants also argue that the BIA's interpretation is unreasonable because it effects no significant change from the status quo. It is true that prior to CSPA's passage, an aged-out derivative beneficiary of an F2A petition was already entitled to priority date retention when an F2B petition was filed on his or her behalf. *See* 8 C.F.R. § 204.2(a)(4) ("[I]f the [derivative beneficiary of an F2A petition] reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a case, *the original priority date will be retained if the subsequent petition is filed by the same petitioner.*" (emphasis added)). But this regulation does not provide for automatic conversion, and it does not address aged-out *primary* beneficiaries of F2A petitions. Therefore, § 1153(h)(3) as interpreted by the BIA is not without effect.

Nor do we find that this interpretation "conflict[s] with Congress' expressed intent." *Or. Trollers Ass'n,* 452 F.3d at 1116. It is clear that Congress wanted the CSPA to provide some measure of age-out relief to *all* derivative beneficiaries of family preference petitions. *See, e.g.,* H.R. Rep. No. 107-807 at 49 (referring to the CSPA as "extend[ing] age-out protection" to the children of family-sponsored immigrants).

However, it is undisputed that *all* derivative beneficiaries are protected from age-out due to administrative delays under § 1153(h)(1). In fact, this was the only form of relief that House sponsors referred to when they introduced the provisions at issue, which the Senate had added. *See, e.g.,* 148 Cong. Rec. H4990 (daily ed. July 22, 2002) (statement of Rep. Sensenbrenner) (noting that the Senate's amendments addressed "situations where alien children lose immigration benefits by 'aging out' *as a result of INS processing delays.*") (emphasis added).

As the BIA recognized, protection from administrative delays was highly significant to Congress. *See Matter of Wang,* 25 I. & N. Dec. at 36-37 (noting that "the drive for the legislation was the then-extensive administrative delays in the processing of visa petitions"). While the Senate bill's sponsor expressed an intent to address over subscription delays as well, she focused only on children of LPRs, who could fall into the F2A category. *See* 147 Cong. Rec. S3275-76 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein). Given that § 1153(h)(1) entitles *all* derivative children to relief from administrative delays, we cannot say that the BIA's interpretation of § 1153(h)(3) is contrary to congressional intent simply because it affords *additional* relief only to children in the F2A category.

Finally, we point out that limiting § 1153(h)(3)'s applicability to F2A petitions is "a reasonable policy choice for the agency to make." *Chevron,* 467 U.S. at 845, 104 S. Ct. 2778. Applying § 1153(h)(3) to *all* derivative beneficiaries would result in a fundamental change to the family preference scheme, because it would effectively treat an aged-out derivative benefi-

ciary of an F3 or F4 petition as if he or she had been independently entitled to his or her own priority date based on his or her status as the grandchild, niece, or nephew of a citizen. However, those relationships have never been recognized as qualifying ones under U.S. immigration law. This same problem does not arise for a derivative of an F2A petition because he or she can be independently eligible for a priority date as the primary beneficiary of an F2A petition. It is therefore not arbitrary or otherwise unreasonable for the BIA's interpretation of § 1153(h)(3) to draw the line where it does. This interpretation warrants our deference under *Chevron*.

V

We hold that § 1153(h)(3) is ambiguous as to whether derivative beneficiaries of F3 and F4 family preference petitions are entitled to automatic conversion or priority date retention. Because we also hold that the BIA's interpretation of § 1153(h)(3) is reasonable, we defer to it under *Chevron*. Under that interpretation, automatic conversion and priority date retention do not apply to F3 and F4 petitions. Therefore, Appellants are not entitled to relief. The judgment of the district court is **AFFIRMED**.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

NOS.: SACV 09-93 JVS(SHX), CV 08-6919 JVS(SHX),
CV 08-5301 JVS(SHX), EDCV 08-840 JVS(SHX)

BAILUN ZHANG, PLAINTIFF

v.

JANET NAPOLITANO, DEFENDANT

ARBI TOROSSIAN, ET AL, PLAINTIFFS

v.

DAVID DOUGLAS, ET AL., DEFENDANTS

SHAHAB DOWLATSHAHI, PLAINTIFF

v.

ERIC HOLDER, ET AL., DEFENDANTS

ROSALINA CUELLAR DE OSORIO, ET AL, PLAINTIFFS

v.

AYTES, ET AL, DEFENDANTS

Filed: Oct. 9, 2009

ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS *DOWLATSHAHI* ACTION

JAMES V. SELNA, District Judge.

These cases concern the proper interpretation of a provision of the Child Status Protection Act ("CSPA") § 203(h)(3) of the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1153(h)(3).

Plaintiffs in these actions are parents, and in some cases their adult children, who under § 203(h)(3) seek to transfer the priority date from family third- and fourth-preference ("F3" and "F4," respectively) visa petitions[1] to family second-preference ("F2B") visa petitions.[2] The F3 and F4 petitions were filed by U.S. citizen relatives on behalf of the parent-Plaintiffs, whereas the F2B petitions were filed by the parent-Plaintiffs on behalf of their adult sons and daughters after the parents became lawful permanent residents of the United States. These sons and daughters, named as derivative beneficiaries of the F3 and F4 petitions, lost eligibility to immigrate as derivative beneficiaries when they turned twenty-one before a

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[1] The F3 and F4 classifications are codified at 8 U.S.C. § 1153(a)(3) and (4), respectively.

[2] The F2B classification is codified at 8 U.S.C. § 1153(a)(2)(B). This provision relates to "unmarried sons or unmarried daughters," as opposed to the "children," of lawful permanent residents. In relevant part, a "child" is an unmarried person under age twenty-one. 8 U.S.C. § 1101(b)(1).

visa number became available to their parents. Plaintiffs now seek review of the U.S. Citizenship and Immigration Services's ("USCIS's") determination that the sons and daughters were not eligible to adjust status based on an automatic conversion of the F3 and F4 petitions to F2B petitions and the retention of the original priority date from the former petitions. Plaintiffs seek relief under the Declaratory Judgment Act, 28 U.S.C. § 2201; the All Writs Act, 28 U.S.C. § 1651; the Mandamus Act, 28 U.S.C. § 1361; and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*

Presently before the Court are the parties' cross-motions for summary judgment under Federal Rule of Civil Procedure 56.

I. *Background*

These cases present a question of first impression for the federal judiciary. Defendants frame the issue as follows:

> [W]hether, under [§ 203(h)(3)], aliens who aged-out of their derivative [F3 and] F4 classification[s] may transfer the priority date from [those] petition [s] to a later F2B petition when the petitions [were] filed by different petitioners and after there has been a gap in eligibility for classification under the INA.

(Defs.' Mot. Br. 7-8.) No federal court has addressed this precise issue. But the Board of Immigration Appeals ("BIA") has issued a published decision in *Matter of Wang,* 25 I. & N. Dec. 28, 28 (B.I.A.2009), holding that "[t]he automatic conversion and priority date retention provisions of [§ 203(h)(3)] do not apply to an alien who ages out of eligibility for an immigrant

visa as the derivative beneficiary of a fourth-preference visa petition, and on whose behalf a second-preference petition is later filed by a different petitioner." Accordingly, the issue here is whether the Court should give deference to *Wang* under the two-step framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

To make this inquiry, the Court provides background on the statutory provision at issue, the agency interpretation on point, and the factual circumstances of the present cases.

A. *Section 203(h)(3)*

Over a decade ago, "an enormous backlog of adjustment of status (to permanent residence) applications . . . developed at the INS." H.R. Rep. No. 107-45, p. 2 (2001), *as reprinted in* 2002 U.S.C.C.A.N. 640, 641. As a result, child beneficiaries of visa applications often would "age out," or turn twenty-one, before the application was processed, thereby requiring the applicant to shift into a lower preference classification and be placed "at the end of a long waiting list for a visa." *Id.* Most notably, "children" at the F2A classification would shift to the F2B classification for "unmarried sons [and] unmarried daughters" upon turning twenty-one. *Compare* 8 U.S.C. § 1153(a)(2)(A), *with id.* § 1153(a)(2)(B). The CSPA was enacted to provide age-out protection for individuals who were children at the time a petition or application for permanent resident status was filed on their behalf. *Padash v. INS,* 358 F.3d 1161, 1167 (9th Cir. 2004).

Among other things, the CSPA amended § 203 of the INA by adding what is now subsection (h). Section 203(h) provides that an alien's age for purposes of the F2A classification is to be determined by subtracting the time that the petition for classification was pending from the alien's age at the time that a visa number becomes available. 8 U.S.C. § 1153(h)(1)-(2). If the alien is determined to be twenty-one or older after applying this calculation, the statute provides for the automatic conversion of the petition to the appropriate category and the retention of the original priority date from when the original petition was filed. *Id.* § 1153(h)(3). Specifically, § 203(h)(3) provides:

> If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

8 U.S.C. § 1153(h)(3). This provision, at the heart of the controversy here, was interpreted by the BIA in *Wang.*

B. *The BIA's decision in Wang*

In *Wang,* a visa number became available to the plaintiff as a beneficiary of an F4 petition filed by his U.S. citizen sister after one of his daughters, a derivative of her father on the original petition, aged out. 25 I. & N. Dec. at 29. The plaintiff then filed an F2B petition for his aged-out daughter. *Id.* at 30. At issue in *Wang* was "whether a derivative beneficiary who has aged out of a fourth-preference visa petition

may automatically convert her status to that of a beneficiary of a second-preference category pursuant to [§ 203(h) of the INA]." 25 I. & N. Dec. at 30. In resolving this issue, the BIA squarely addressed the automatic conversion and priority date retention provisions of § 203(h)(3).

The BIA began by observing that the phrases "automatic conversion" and "retention" had recognized meanings in the regulatory and statutory context in which Congress enacted § 203(h)(3). The BIA noted that 8 C.F.R. § 204.2(i) provides for the "automatic conversion" from one preference category to another upon the occurrence of certain events, *id.* at 34 (citing Automatic Conversion of Classification of Beneficiary, 52 Fed. Reg. 33,797 (Sept. 8, 1987)), and that 8 C.F.R. § 204.2(a)(4) provides for "retention" of a priority date for "a lawful permanent resident's son or daughter who was previously eligible as a derivative beneficiary under a second-preference spousal petition filed by that same lawful permanent resident." *Id.* The BIA further observed that the CSPA added § 201(f) to the INA, for which the "conversion" of the original petition from one preference category to another occurs automatically by operation of law. *Id.* at 34-35. Based on these regulatory and statutory provisions, the BIA held that "conversion" means to shift from one visa category to another without the need to file a new visa petition, and that "retention" of priority dates is limited to visa petitions filed by the same family member. *Id.* The BIA therefore concluded that § 203(h)(3) did not apply to the plaintiff's daughter in *Wang:*

> First, with regard to the "automatic conversion" referenced in section 203(h)(3), we look to see to

> which category the fourth-preference petition converted at the moment the beneficiary aged out. When the beneficiary aged out from her status as a derivative beneficiary on a fourth-preference petition, *there was no other category to which her visa could convert because no category exists for the niece of a United States citizen.* Second, if we apply the "retention" language of section 203(h) here, we look to see if the new petition was filed on the beneficiary's behalf by the same petitioner. In the beneficiary's case, *the new visa petition has been filed by her father, not by her aunt (who was the original petitioner).*

Id. at 35 (emphases added). But the BIA's inquiry did not end there. The BIA also searched the CSPA's legislative history for evidence of a congressional intent to expand the use of the automatic conversion and priority date retention concepts. The BIA found none. Instead, the BIA noted that House reports and related statements from House members revealed "that the drive for the legislation was the then-extensive administrative delays in the processing of visa petitions and applications resulting in the aging out of beneficiaries of petitions filed by United States citizens and the associated loss of child status for immigration purposes." *Id.* at 36-37 (citing the Congressional Record). The BIA also found "repeated discussion in the House . . . of the intention to allow for retention of child status 'without displacing others who have been waiting patiently in other visa categories.'" *Id.* at 37 (citing the Congressional Record). Accordingly, the BIA held that the automatic conversion and priority date retention provisions did not apply to an alien who aged out of eligibility for an

immigrant visa as the derivative beneficiary of an F4 petition, and on whose behalf an F2B petition was later filed by a different petitioner. *Id.* at 38-39.[3]

C. *The Facts in These Cases*

The factual circumstances of these cases are similar to those in *Wang*.

Plaintiff Bailun Zhang immigrated to the United States from China in 2008 as the beneficiary of an F4 petition filed by his U.S. citizen sister in 1991. (Zhang Compl. ¶ 4.) His son was a derivative of that petition, but aged out prior to the date that Zhang's visa was issued. (*Id.* ¶ 9.)

Plaintiff Ojik Babomian came to the United States from Iran in 1996, and became a lawful permanent resident as the beneficiary of an F3 petition filed by her U.S. citizen mother in 1998. (Torossian Compl. ¶¶ 26, 30.) Plaintiff Arbi Torossian, her son, aged out before Babomian was eligible to adjust her status to that of lawful permanent resident in 2007. (*Id.* ¶ 31.)

Plaintiff Shahab Dowlatshahi immigrated to the United States as the beneficiary of an F4 petition filed by his U.S. citizen sister in 1993. (Dowlatshahi

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[3] The BIA's reasoning in *Wang* applies with equal vigor to the automatic conversion and priority date retention from an F3 to an F2B petition. For example, in the case of Torossian below, "there was no other category to which [his] visa could convert because no category exists for the [grandson] of a United States citizen," and "the new visa petition has been filed by [his mother], not by [his grandmother] (who was the original petitioner)." 25 I. & N. Dec. at 35.

Compl. at 2.) His daughter was a derivative of that petition, but aged out before Dowlatshahi's visa number became available.[4]

Plaintiffs Rosalina Cuellar de Osorio, Elizabeth Magpantay, Evelyn Y. Santos, Maria Eloisa Liwag, and Norma Uy became lawful permanent residents in 2006 and 2007 as the result of visa petitions filed by their U.S. citizen relatives. (de Osorio Compl. ¶ 9-13.) Plaintiff Ruth Uy is Uy's daughter. In the original visa petitions that resulted in the parent-Plaintiffs' current lawful permanent residence, their children were listed as derivative beneficiaries. These children aged out before their parents adjusted status.

The parent-Plaintiffs in these cases filed F2B petitions on behalf of their aged-out children. Plaintiffs filed suit claiming that, under § 203(h)(3), the F2B petitions should be assigned the priority date of the earlier F3 and F4 petitions filed by their U.S. citizen relatives.

With this background, the Court now considers the parties' cross-motions for summary judgment.

II. *Legal Standard*

Summary judgment is appropriate where the record, read in the light most favorable to the nonmoving party, indicates that "there is no genuine issue as to

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[4] Dowlatshahi has moved to dismiss his case in light of the Court's class certification in a related case. (Docket No. 50.) Defendants do not oppose. (Docket No. 53.) The Court addresses this motion separately in Section III.C below.

any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The initial burden is on the moving party to demonstrate an absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 323, 106 S. Ct. 2548. Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202. 248 (1986). A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248, 106 S. Ct. 2505. If the moving party meets its burden, then the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. *Id.* at 322-23, 106 S. Ct. 2505. If the nonmoving party meets this burden, then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc.,* 210 F.3d 1099, 1103 (9th Cir. 2000).

Where the parties have made cross-motions for summary judgment, the Court must consider each motion on its own merits. *Fair Hous. Council v. Riverside Two,* 249 F.3d 1132, 1136 (9th Cir. 2001). The Court will consider each party's evidentiary showing, regardless of which motion the evidence was tendered under. *See id.* at 1137.

III. *Discussion*

There are no factual disputes here. Thus, the only issue is whether the USCIS's decision not to apply § 203(h)(3)'s automatic conversion and priority date

retention provisions in these cases runs afoul of the "arbitrary and capricious" standard of the APA.

Under the APA, a final agency action can be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A decision is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983); *accord George v. Bay Area Rapid Transit,* 577 F.3d 1005, 1010 (9th Cir. 2009).

The party challenging an agency's action as arbitrary and capricious bears the burden of proof. "'Indeed, even assuming the [agency] made missteps . . . the burden is on petitioners to demonstrate that the [agency's] ultimate conclusions are unreasonable.'" *George,* 577 F.3d at 1011 (alterations and ellipses in original) (quoting *City of Olmsted Falls, Ohio v. FAA,* 292 F.3d 261, 271 (D.C. Cir. 2002)). Even when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account "if the agency's path may reasonably be discerned." *Alaska Dep't of Envtl. Conservation v. EPA,* 540 U.S. 461, 497, 124 S. Ct. 983, 157 L. Ed. 2d 967 (2004). Accordingly, review under the arbitrary and capricious standard is narrow, and the reviewing court may not substitute its judgment

for that of the agency. *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 376, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989); *accord United States v. Snoring Relief Labs Inc.,* 210 F.3d 1081, 1085 (9th Cir. 2000).

Here, the Court finds that Plaintiffs have not carried their burden to show that the USCIS's action in these cases was arbitrary and capricious, and agrees with Defendants that the BIA's decision in *Wang* is entitled to *Chevron* deference.

A. *The Chevron Standard*

Wang is dispositive of this motion. The Plaintiffs fail to carry their burden on these cross-motions because, at bottom, they cannot show that *Wang* is not entitled to *Chevron* deference.

The U.S. Attorney General has vested the BIA with power to exercise its "independent judgment and discretion in considering and determining cases coming before [it]." 8 C.F.R. § 1003.1(d)(1). The Supreme Court has therefore recognized "that the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" *INS v. Aguirre-Aguirre,* 526 U.S. 415, 425, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999) (citing *INS v. Cardoza-Fonseca,* 480 U.S. 421, 448-49, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987)). *Chevron* established a familiar two-step framework for deciding whether an agency's interpretation of a statute is proper. At the first step, the Court asks whether the statute's plain terms "directly address[] the precise question at issue." 467 U.S. at 843, 104 S. Ct. 2778. If the statute is ambiguous on the point, the Court defers at step two to the agency's interpretation

50 long as the construction is "a reasonable policy choice for the agency to make." *Id.* at 845, 104 S. Ct. 2778.

B. *Application of Chevron*

Here, Defendants' interpretation is permissible at both steps.

1. *Section 203(h)(3) Is Ambiguous*

The Court finds that § 203(h)(3) is ambiguous at *Chevron* step one, and endorses the explanation of this ambiguity articulated in *Wang* itself:

> If the beneficiary is determined to be 21 years of age or older pursuant to section 203(h)(1) of the Act, then section 203(h)(3) provides that "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." Unlike sections 203(h)(1) and (2), which when read in tandem clearly define the universe of petitions that qualify for the "delayed processing formula," *the language of section 203(h)(3) does not expressly state which petitions qualify for automatic conversion and retention of priority dates.*

25 I. & N. Dec. at 33 (emphasis added). There is nothing on the face of the statute to support Plaintiffs' contention that this ambiguity arises only "by focusing on the wrong familial relationship as well as the wrong point in time." (Torossian Pls.' Opp'n Br. 3-4.) This contention is further belied by its reliance on the BIA's unpublished decision in *Matter of Garcia*, A79 001 587, 2006 WL 2183654 (B.I.A. June 16, 2006). That the BIA interpreted § 203(h)(3) differently on another

occasion does not prove that the provision is "plain and unambiguous." (Torossian Pls.' Opp'n Br. 2.) Indeed, it suggests the opposite. In any event, only the BIA's published decisions have precedential value. *See* 8 C.F.R. § 1003.1(g).

The Court need not belabor this point. Suffice it to say that Plaintiffs effectively concede the issue in their opposition briefs. According to Plaintiffs, when a hypothetical derivative beneficiary ages out of an F3 or F4 petition, "he automatically converts to the appropriate category (as determined by his relationship to the direct beneficiary[])." (Pls.' Opp'n Br. 8.) That Plaintiffs must add an explanatory parenthetical underscores the ambiguity surrounding the interpretation of § 203(h)(3).

2. *Wang's Interpretation of § 203(h)(3) Is Reasonable*

The Court also concludes that the BIA's interpretation of § 203(h)(3) in *Wang* was "a reasonable policy choice for the [BIA] to make" at *Chevron* step two. 467 U.S. at 845, 104 S. Ct. 2778.

The BIA in *Wang* declined to apply the automatic conversion and priority date retention provisions of § 203(h)(3) "[a]bsent clear legislative intent to create an open-ended grandfathering of priority dates that allow derivative beneficiaries to retain an earlier priority date set in the context of a different relationship, to be used at any time." *Id.* at 39. The BIA began by noting that the provision does not expressly state which petitions qualify for automatic conversion and priority date retention. *Id.* at 33. The BIA then found that the regulatory and statutory context, as well as the legislative record, supported a narrower

interpretation of § 203(h)(3). *Id.* at 34-39. The BIA concluded that the automatic conversion and priority date retention provisions did not apply to an alien who aged out of eligibility for an immigrant visa as the derivative beneficiary of a fourth-preference visa petition, and on whose behalf a second-preference petition was later filed by a different petitioner. *Id.* at 38-39. Hence, the BIA's interpretation in Wang finds ample regulatory and statutory support, and is buttressed by the Congressional Record. As such, it is reasonable.

Plaintiffs' arguments to the contrary are unavailing.

Plaintiffs contend that the CSPA was intended to protect those "who turned twenty-one and subsequently lost their eligibility for immigration benefits." (Torossian Pls. Opp'n Br. 6.) But they neglect to point out that Congress was also concerned with not "displacing others who have been waiting patiently in other visa categories." 25 I. & N. Dec. at 37 (citing the Congressional Record). In any event, the adult sons and daughters here faced no administrative delay per se, but rather a high demand for a limited number of visas. This accords with the BIA's observation in *Wang* that, "[w]hile the CSPA was enacted to alleviate the consequences of administrative delays, there is no clear evidence that it was intended to address delays resulting from visa allocation issues, such as the long wait associated with priority dates." *Id.* at 38.

Plaintiffs also assert that the BIA's interpretation renders the words "and (d)" superfluous within the text of § 203(h)(3). But beneficiaries of petitions filed under subsection (d) include derivative beneficiaries of F2A petitions. Given the BIA's reliance on a perceived intent of Congress not to expand the protection of the

act, the Court cannot say that an interpretation of the reference to subsection (d) which restricts subsection (d) to beneficiaries of derivative F2A petitions is unreasonable. At a minimum there is an ambiguity, and it is the BIA's duty to resolve it.

Plaintiffs further contend that the BIA failed to discuss various regulatory and statutory provisions. But none of Plaintiffs' cited examples weigh heavily because none use the terms "conversion" and "retention" in conjunction. (Torossian Pls.' Opp'n Br. 16-18, citing 8 C.F.R. § 204.2(h)(2); 8 C.F.R. § 204.5(e); 8 C.F.R. § 204.12(f)(1); USA Patriot Act of 2001, Pub. L. No. 107-56, § 421(c) 423, 115 Stat. 272; Western Hemisphere Savings Clause, P.L. 94-571, 90 Stat. 2703 (October 20, 1976).)

Finally, Plaintiffs cite *Baruelo v. Comfort*, No. 05 C 6659, 2006 WL 3883311 (N.D. Ill. Dec. 29, 2006), for the proposition that adult sons and daughters should not have to go to the back of another line to wait for visa numbers to become available. But *Baruelo* is inapposite. There, the plaintiff was a primary beneficiary of an F2A petition filed by her mother, a lawful permanent resident. *Id.* at *1. The petition was approved but administrative delays prevented the plaintiff from obtaining her visa until after she had aged out into the F2B preference classification. The plaintiff in *Baruelo* is precisely the class of alien that the BIA determined to be eligible for automatic conversion and priority date retention under § 203(h)(3). Thus, the holding in *Baruelo* comports with the BIA's decision in *Wang*.

Accordingly, *Wang* is entitled to *Chevron* deference, and Defendants did not act arbitrarily or capri-

ciously in refusing to apply § 203(h)(3) to the adult sons and daughters in these cases.

C. *Dowlatshahi's Motion*

As a final matter, Plaintiff Shahab Dowlatshahi has filed a motion to dismiss his case. (Docket No. 50.) The motion is based on Dowlatshahi's asserted membership in a class certified under Rule 23(b)(2) by this Court in *Costelo v. Chertoff*, 258 F.R.D. 600 (C.D.Cal.2009):

> Aliens who became lawful permanent residents as primary beneficiaries of third- and fourth-preference visa petitions listing their children as derivative beneficiaries, and who subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § 203(h)(3).

Id. at 609. Dowlatshahi "believes that [Rule] 23(b)(2) renders his membership in the class created by *Costelo* as mandatory and therefore moves to dismiss his independent action." (Docket No. 50, at 7.) The Court entertains the motion despite its noncompliance with the Local Rules. (Docket No. 51.) To be sure, although the class in *Costelo* is mandatory in that class members do not have an automatic right to notice or a right to opt out of the class, *see Reeb v. Ohio Dep't of Rehab. and Corr.*, 435 F.3d 639, 645-46 (6th Cir. 2006), the "mandatory" nature of the class does not necessarily preclude Dowlatshahi's separate suit. The Court nonetheless grants the motion in accordance

with Dowlatshahi wishes and in view of Defendant's non-opposition. (Docket No. 53.)

IV. *Conclusion*

For the foregoing reasons, the Court DISMISSES *Dowlatshahi v. Holder, et al.*, CV 08-5301 JVS (SHx). The Court DENIES the Plaintiffs' motions and GRANTS Defendants' motions in the remaining cases. The Court cannot compel Defendants to act where their inaction was not arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A).

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No.: SA08-00688-JVS(SHx)

TERESITA G. COSTELO, ET AL.

v.

MICHAEL CHERTOFF, ET AL.

Filed: Nov. 10, 2009

PROCEEDINGS: (IN CHAMBERS) ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO STAY DISCOVERY

JAMES V. SELNA, Judge.

Plaintiffs Teresita Costelo and Lorenzo Ong, appearing individually and on behalf of all others similarly situated (collectively, "Plaintiffs") and Defendants Janet Napolitano, *et al.* (collectively, "Defendants") have filed cross-motions for summary judgment under Federal Rule of Civil Procedure 56. Defendants have also filed a motion to stay discovery pending the decision on cross-motions for summary judgment.

I *Legal Standard*

Summary judgment is appropriate where the record, read in the light most favorable to the nonmoving party, indicates that "there is no genuine issue as to

any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). The initial burden is on the moving party to demonstrate an absence of a genuine issue of material fact. *Celotex.* 477 U.S. at 323. Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. If the moving party meets its burden, then the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. *Id.* at 322-23. If the nonmoving party meets this burden, then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc.,* 210 F.3d 1099, 1103 (9th Cir. 2000).

Where the parties have made cross-motions for summary judgment, the Court must consider each motion on its own merits. *Fair Hous. Council v. Riverside Two,* 249 F.3d 1132, 1136 (9th Cir. 2001). The Court will consider each party's evidentiary showing, regardless of which motion the evidence was tendered under. *See id.* at 1137.

II. *Discussion*

The issue in this case is whether a provision of the Child Status Protection Act ("CSPA"), § 203(h)(3) of the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1153(h)(3), allows "aged-out" derivative beneficiaries of third- or fourth-preference ("F3" and "F4," respectively) visa petitions to automatically

convert their derivative petitions to second-preference ("F2B") visa petitions, thereby retaining their original priority date. On July 19, 2009, the Court certified a class consisting of:

> Aliens who became lawful permanent residents as primary beneficiaries of third- and fourth-preference visa petitions listing their children as derivative beneficiaries, and who subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § 203(h)(3).

(Docket No. 74.)

This Court decided this exact issue in *Zhang v. Napolitano,* 663F. Supp. 2d 913, 2009 WL 3347345 (C.D. Cal. October 9, 2009), holding that the Board of Immigration Appeals's ("BIA") interpretation of § 203(h)(3) of the INA set forth in *Matter of Wang.* 25 I. & N. Dec. 28 (B.I.A. 2009) was entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). The BIA in *Wang* held that "[t]he automatic conversion and priority date retention provisions of [§ 203(h)(3)] do not apply to an alien who ages out of eligibility for an immigrant visa as the derivative beneficiary of a fourth-preference visa petition, and on whose behalf a second-preference petition is later filed by a different petitioner."

Plaintiffs have presented only one argument that was not explicitly considered in *Zhang.*[1] They argue that the *Wang* interpretation contradicts INA § 203(h)(4), which states that § 203(h)(l)-(3) "shall apply to self-petitioners and derivatives of self-petitioners." Plaintiffs argue that, under the BIA's interpretation, an aged-out derivative of a self-petitioner would have no appropriate category to automatically convert to, yet, § 203(h)(4) is explicit that § 203(h)(3) conversion applies to derivatives of self-petitioners.

Plaintiffs contention is simply incorrect. 8 U.S.C. §§ 1154(A) (1)(D)(i)(I) & (III) provide explicit statutory authority for automatic reclassification for a self-petitioner or derivative self-petitioner who ages-out prior to the priority date becoming current. Section 1154(A)(1)(D)(i)(I) states:

> Any child who attains 21 years of age who has filed a [self-petition] that was filed or approved before the date on which the child attained 21 years of age

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[1] In their Reply Brief, Plaintiffs also argued that Congress could not have been intended to solely address administrative delay in the CSPA because of the "opt-out" provision of INA § 204(k)(2) was aimed at preventing injustice where a F2B petition converted to the F1 line, which, for certain countries, had a longer wait. The Court fails to see the relevance of § 203(k)(2) to the situation here. The "opt-out" provision was intended to prevent the unmarried sons or daughters of lawful permanent residents from being penalized by their parents attaining U.S. citizenship. 148 Cong. Rec. H4991 (daily ed. July 22, 2002) (statement of Rep. Sensenbrenner). It sought to prevent "naturalizing-out" and is unrelated to the "aging-out" provisions of CSPA.

> shall be considered (if the child has not been admitted or approved for lawful permanent residence by the date the child attained 21 years of age) a petitioner for preference status under paragraph (1), (2), or (3) of section 1153(a) of this title, whichever paragraph is applicable, with the same priority date assigned to the self-petition. . . . No new petition shall be required to be filed.

Section 1154(A) (1)(D)(i)(III) states:

> Any derivative child who attains 21 years of age who is included in a [self-petition] that was filed or approved before the date on which the child attained 21 years of age shall be considered (if the child has not been admitted or approved for lawful permanent residence by the date the child attained 21 years of age) a VAWA self-petitioner with the same priority date as that assigned to the [self-petitioner]. No new petition shall be required to be filed.

Thus, there is no contradiction between *Wang* and INA § 203(h) (4). Self-petitioners or derivatives of self-petitioners are explicitly reclassified by statute when they age-out, leaving no gap of ineligibility, unlike the aged-out derivative beneficiaries of F3 or F4 petitions. Section 203(h)(4) supports, rather than contradicts, the Wang interpretation.

For the reasons laid out in *Zhang,* the Court finds that Section 203(h)(3) is ambiguous and that the BIA's interpretation is reasonable. *See Zhang.* 2009 WL 3347345, at *5-7. Accordingly, Defendants are entitled summary judgment.

III. *Conclusion*

For the foregoing reasons, the Court DENIES Plaintiffs' motion and GRANTS Defendants motion. Defendants motion to stay discovery is DENIED as moot.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos.: 09-56786, 09-56846.
D.C. Nos.: 5:08-cv-00840-JVS-SH,
8:08-cv-00688-JVS-SH.

ROSALINA CUELLAR DE OSORIO; ELIZABETH MAGPANTAY; EVELYN Y. SANTOS; MARIA ELOISA LIWAG; NORMA UY; RUTH UY, PLAINTIFFS–APPELLANTS

v.

ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; JANET NAPOLITANO, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; HILLARY RODHAM CLINTON, SECRETARY OF STATE, DEFENDANTS–APPELLEES

TERESITA G. COSTELO; LORENZO P. ONG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS–APPELLANTS

v.

JANET NAPOLITANO, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; LYNNE SKEIRIK, DIRECTOR, NATIONAL VISA CENTER; CHRISTINA POULOS, ACTING DIRECTOR, CALIFORNIA SERVICE CENTER, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; HILLARY RODHAM CLINTON, SECRETARY OF STATE, DEFENDANTS–APPELLEES

April 20, 2012

ORDER

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

APPENDIX F

Section 1153 of Title 8 of the United States Code provides:

Allocation of immigrant visas

(a) Preference allocation for family-sponsored immigrants

Aliens subject to the worldwide level specified in section 1151(c) of this title for family-sponsored immigrants shall be allotted visas as follows:

(1) Unmarried sons and daughters of citizens

Qualified immigrants who are the unmarried sons or daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the class specified in paragraph (4).

(2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens

Qualified immigrants—

(A) who are the spouses or children of an alien lawfully admitted for permanent residence, or

(B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence,

shall be allocated visas in a number not to exceed 114,200, plus the number (if any) by which such worldwide level exceeds 226,000, plus any visas not required for the class specified in paragraph (1); ex-

cept that not less than 77 percent of such visa numbers shall be allocated to aliens described in subparagraph (A).

(3) Married sons and married daughters of citizens

Qualified immigrants who are the married sons or married daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the classes specified in paragraphs (1) and (2).

(4) Brothers and sisters of citizens

Qualified immigrants who are the brothers or sisters of citizens of the United States, if such citizens are at least 21 years of age, shall be allocated visas in a number not to exceed 65,000, plus any visas not required for the classes specified in paragraphs (1) through (3).

(b) Preference allocation for employment-based immigrants

Aliens subject to the worldwide level specified in section 1151(d) of this title for employment-based immigrants in a fiscal year shall be allotted visas as follows:

(1) Priority workers

Visas shall first be made available in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (4) and (5), to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability

An alien is described in this subparagraph if—

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

(B) Outstanding professors and researchers

An alien is described in this subparagraph if—

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States—

(I) for a tenured position (or tenure-track position) within a university or

institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

(C) Certain multinational executives and managers

An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer

(i) National interest waiver

Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

(ii) Physicians working in shortage areas or veterans facilities

(I) In general

The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if—

(aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

(bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

(II) Prohibition

No permanent resident visa may be issued to an alien physician described in subclause (I) by the Secretary of State under section 1154(b) of this title, and the Attorney General may not adjust the status of such an alien physician from that of a nonimmigrant alien to

that of a permanent resident alien under section 1255 of this title, until such time as the alien has worked full time as a physician for an aggregate of 5 years (not including the time served in the status of an alien described in section 1101(a)(15)(J) of this title), in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs.

(III) Statutory construction

Nothing in this subparagraph may be construed to prevent the filing of a petition with the Attorney General for classification under section 1154(a) of this title, or the filing of an application for adjustment of status under section 1255 of this title, by an alien physician described in subclause (I) prior to the date by which such alien physician has completed the service described in subclause (II).

(IV) Effective date

The requirements of this subsection do not affect waivers on behalf of alien physicians approved under subsection (b)(2)(B) of this section before the enactment date of this subsection. In the case of a physician for whom an appli-

cation for a waiver was filed under subsection (b)(2)(B) of this section prior to November 1, 1998, the Attorney General shall grant a national interest waiver pursuant to subsection (b)(2)(B) of this section except that the alien is required to have worked full time as a physician for an aggregate of 3 years (not including time served in the status of an alien described in section 1101(a)(15)(J) of this title) before a visa can be issued to the alien under section 1154(b) of this title or the status of the alien is adjusted to permanent resident under section 1255 of this title.

(C) Determination of exceptional ability

In determining under subparagraph (A) whether an immigrant has exceptional ability, the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability.

(3) Skilled workers, professionals, and other workers

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the

classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers

Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals

Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

(iii) Other workers

Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(B) Limitation on other workers

Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii).

(C) Labor certification required

An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a)(5)(A) of this title.

(4) Certain special immigrants

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified special immigrants described in section 1101(a)(27) of this title (other than those described in subparagraph (A) or (B) thereof), of which not more than 5,000 may be made available in any fiscal year to special immigrants described in subclause (II) or (III) of section 1101(a)(27)(C)(ii) of this title, and not more than 100 may be made available in any fiscal year to special immigrants, excluding spouses and children, who are described in section 1101(a)(27)(M) of this title.

(5) Employment creation

(A) In general

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership)—

(i) in which such alien has invested (after November 29, 1990) or, is actively in the

process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

(B) Set-aside for targeted employment areas

(i) In general

Not less than 3,000 of the visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who invest in a new commercial enterprise described in subparagraph (A) which will create employment in a targeted employment area.

(ii) "Targeted employment area" defined

In this paragraph, the term "targeted employment area" means, at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).

(iii) "Rural area" defined

In this paragraph, the term "rural area" means any area other than an area

within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).

(C) Amount of capital required

(i) In general

Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be $1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

(ii) Adjustment for targeted employment areas

The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than 1/2 of) the amount specified in clause (i).

(iii) Adjustment for high employment areas

In the case of an investment made in a part of a metropolitan statistical area that at the time of the investment—

(I) is not a targeted employment area, and

(II) is an area with an unemployment rate significantly below the national average unemployment rate,

the Attorney General may specify an amount of capital required under subparagraph (A) that is greater than (but not greater than 3 times) the amount specified in clause (i).

(D) Full-time employment defined

In this paragraph, the term "full-time employment" means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

(6) Special rules for "K" special immigrants

(A) Not counted against numerical limitation in year involved

Subject to subparagraph (B), the number of immigrant visas made available to special immigrants under section 1101(a)(27)(K) of this title in a fiscal year shall not be subject to the numerical limitations of this subsection or of section 1152(a) of this title.

(B) Counted against numerical limitations in following year

(i) Reduction in employment-based immigrant classifications

The number of visas made available in any fiscal year under paragraphs (1), (2), and (3) shall each be reduced by 1/3 of the number of visas made available in the previous fiscal year to special immigrants described in section 1101(a)(27)(K) of this title.

(ii) Reduction in per country level

The number of visas made available in each fiscal year to natives of a foreign state under section 1152(a) of this title shall be reduced by the number of visas made available in the previous fiscal year to special immigrants described in section 1101(a)(27)(K) of this title who are natives of the foreign state.

(iii) Reduction in employment-based immigrant classifications within per country ceiling

In the case of a foreign state subject to section 1152(e) of this title in a fiscal year (and in the previous fiscal year), the number of visas made available and allocated to each of paragraphs (1) through (3) of this subsection in the fiscal year shall be reduced by 1/3 of the number of visas made available in the previous fiscal

year to special immigrants described in section 1101(a)(27)(K) of this title who are natives of the foreign state.

(c) Diversity immigrants

(1) In general

Except as provided in paragraph (2), aliens subject to the worldwide level specified in section 1151(e) of this title for diversity immigrants shall be allotted visas each fiscal year as follows:

(A) Determination of preference immigration

The Attorney General shall determine for the most recent previous 5-fiscal-year period for which data are available, the total number of aliens who are natives of each foreign state and who (i) were admitted or otherwise provided lawful permanent resident status (other than under this subsection) and (ii) were subject to the numerical limitations of section 1151(a) of this title (other than paragraph (3) thereof) or who were admitted or otherwise provided lawful permanent resident status as an immediate relative or other alien described in section 1151(b)(2) of this title.

(B) Identification of high-admission and low-admission regions and high-admission and low-admission states

The Attorney General—

(i) shall identify—

(I) each region (each in this paragraph referred to as a "high-admission region")

for which the total of the numbers determined under subparagraph (A) for states in the region is greater than 1/6 of the total of all such numbers, and

(II) each other region (each in this paragraph referred to as a "low-admission region"); and

(ii) shall identify—

(I) each foreign state for which the number determined under subparagraph (A) is greater than 50,000 (each such state in this paragraph referred to as a "high-admission state"), and

(II) each other foreign state (each such state in this paragraph referred to as a "low-admission state").

(C) Determination of percentage of worldwide immigration attributable to high-admission regions

The Attorney General shall determine the percentage of the total of the numbers determined under subparagraph (A) that are numbers for foreign states in high-admission regions.

(D) Determination of regional populations excluding high-admission states and ratios of populations of regions within low-admission regions and high-admission regions

The Attorney General shall determine—

(i) based on available estimates for each region, the total population of each region not including the population of any high-admission state;

(ii) for each low-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the low-admission regions; and

(iii) for each high-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the high-admission regions.

(E) Distribution of visas

(i) No visas for natives of high-admission states

The percentage of visas made available under this paragraph to natives of a high-admission state is 0.

(ii) For low-admission states in low-admission regions

Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of

a high-admission state) in a low-admission region is the product of—

(I) the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(ii).

(iii) For low-admission states in high-admission regions

Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of a high-admission state) in a high-admission region is the product of—

(I) 100 percent minus the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(iii).

(iv) Redistribution of unused visa numbers

If the Secretary of State estimates that the number of immigrant visas to be issued to natives in any region for a fiscal year under this paragraph is less than the number of immigrant visas made available to such natives under this paragraph for the fiscal year, subject to clause (v), the excess visa numbers shall be made available to natives (other than natives of a high-admission state) of the other regions

in proportion to the percentages otherwise specified in clauses (ii) and (iii).

(v) Limitation on visas for natives of a single foreign state

The percentage of visas made available under this paragraph to natives of any single foreign state for any fiscal year shall not exceed 7 percent.

(F) "Region" defined

Only for purposes of administering the diversity program under this subsection, Northern Ireland shall be treated as a separate foreign state, each colony or other component or dependent area of a foreign state overseas from the foreign state shall be treated as part of the foreign state, and the areas described in each of the following clauses shall be considered to be a separate region:

(i) Africa.

(ii) Asia.

(iii) Europe.

(iv) North America (other than Mexico).

(v) Oceania.

(vi) South America, Mexico, Central America, and the Caribbean.

(2) Requirement of education or work experience

An alien is not eligible for a visa under this subsection unless the alien—

(A) has at least a high school education or its equivalent, or

(B) has, within 5 years of the date of application for a visa under this subsection, at least 2 years of work experience in an occupation which requires at least 2 years of training or experience.

(3) Maintenance of information

The Secretary of State shall maintain information on the age, occupation, education level, and other relevant characteristics of immigrants issued visas under this subsection.

(d) Treatment of family members

A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 1101(b)(1) of this title shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

(e) Order of consideration

(1) Immigrant visas made available under subsection (a) or (b) of this section shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the

Attorney General (or in the case of special immigrants under section 1101(a)(27)(D) of this title, with the Secretary of State) as provided in section 1154(a) of this title.

(2) Immigrant visa numbers made available under subsection (c) of this section (relating to diversity immigrants) shall be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State for the fiscal year involved.

(3) Waiting lists of applicants for visas under this section shall be maintained in accordance with regulations prescribed by the Secretary of State.

(f) Authorization for issuance

In the case of any alien claiming in his application for an immigrant visa to be described in section 1151(b)(2) of this title or in subsection (a), (b), or (c) of this section, the consular officer shall not grant such status until he has been authorized to do so as provided by section 1154 of this title.

(g) Lists

For purposes of carrying out the Secretary's responsibilities in the orderly administration of this section, the Secretary of State may make reasonable estimates of the anticipated numbers of visas to be issued during any quarter of any fiscal year within each of the categories under subsections (a), (b), and (c) of this section and to rely upon such estimates in authorizing the issuance of visas. The Secretary of State shall terminate the registration of any alien who fails to apply for an immigrant visa

within one year following notification to the alien of the availability of such visa, but the Secretary shall reinstate the registration of any such alien who establishes within 2 years following the date of notification of the availability of such visa that such failure to apply was due to circumstances beyond the alien's control.

(h) Rules for determining whether certain aliens are children

(1) In general

For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 1101(b)(1) of this title shall be made using—

(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by

(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

(2) Petitions described

The petition described in this paragraph is—

(A) with respect to a relationship described in subsection (a)(2)(A) of this section, a petition filed under section 1154 of this title for classification of an alien child under subsection (a)(2)(A) of this section; or

(B) with respect to an alien child who is a derivative beneficiary under subsection (d) of this section, a petition filed under section 1154 of this title for classification of the alien's parent under subsection (a), (b), or (c) of this section.

(3) Retention of priority date

If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

(4) Application to self-petitions

Paragraphs (1) through (3) shall apply to self-petitioners and derivatives of self-petitioners.